Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BOARD OF EDUCATION OF RICH TOWNSHIP HIGH SCHOOL DISTRICT 227 and WILLIS A. BRUNSON,

Petitioners,

v.

TERRENCE L. BROWN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Illinois Appellate Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a state statute is unconstitutional on its face where it permits public school boundaries to be altered and the student population of public school districts to be changed while expressly prohibiting consideration of the impact upon the racial composition of the student body of the school districts affected.

PARTIES TO THE PROCEEDING

The following are the parties in this matter:

Petitioners: BOARD OF EDUCATION OF RICH TOWNSHIP HIGH SCHOOL DISTRICT 227, COOK COUNTY, ILLINOIS, and WILLIS A. BRUNSON.

Respondents: TERRENCE L. BROWN, CAROLYN A. BROWN, THOMAS VANDER LUITGAREN, DONNA J. VANDER LUITGAREN, BRUCE A. PETERSON, CARLA J. INWOOD, KEVIN J. WOODS, JODY L. WOODS, MICHAEL E.C. MOSS, and JUDITH MOSS, as the COMMITTEE OF TEN, attorney in fact for all the petitioners; CHERYL R. ROSSEN, in her official capacity as Hearing Officer and Secretary, ex-officio, of the Joint Hearing Board; THE RICH TOWNSHIP TRUSTEES OF SCHOOLS; KEVIN CONLON, MIKE JORDAN, and CALVIN JORDAN, in their official capacities as the Rich Township Trustees of Schools; ROBERT G. GROSSI, in his official capacity as Hearing Officer; THE BLOOM TOWNSHIP TRUSTEES OF SCHOOLS; FRANK VILLAGOMEZ, JOHN ROSS, and JOHN MARKS in their official capacities as the Bloom Township Trustees of Schools; DAVID HEARNE, in his official capacity as Hearing Officer; THE BREMEN TOWNSHIP TRUSTEES OF SCHOOLS; RONALD SZABO; KATHY McCREERY, and ELEANOR HEITMANN, in their official capacities

PARTIES TO THE PROCEEDING – Continued

as the Bremen Township Trustees of Schools; RICHARD LETURNO, in his official capacity as Hearing Officer; THE THORNTON TOWNSHIP TRUSTEES OF SCHOOLS; RANDY R. SCHAFER, MARTIN LaREAU, and MARK A. MYERS, in their official capacities as the Thornton Township Trustees of Schools; and BOARD OF EDUCATION OF HOMEWOOD-FLOSSMOOR HIGH SCHOOL DISTRICT NO. 233.

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STATEMENT OF JURISDICTION

1. The judgment of the Illinois Appellate Court was entered on December 30, 1999. The orders of the Circuit Court of Cook County were issued on November 15, 1996, March 4, 1998, April 24, 1998 and June 5, 1998. The Illinois Supreme Court denied a petition for leave to appeal on May 31, 2000.

2. The statutory provisions conferring jurisdiction on this Court to review on a *writ of certiorari* the judgment/order in question are 28 U.S.C. § 1257 and Rule 13.1 of the United States Supreme Court Rules.

3. The notification required by Rule 29.4(b) has been made as 28 U.S.C. § 2403(b) may apply to this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

105 ILCS 5/7-2b

Sec. 7-2b. *Annexation of non-coterminous territory from an elementary or high school district.* (a) Any contiguous portion of a high school district that constitutes 5% or less of the equalized assessed value of the district and 5% or less of the territory of the district shall upon petition of two-thirds of the registered voters of the territory proposed to be detached and annexed be so detached and annexed by the regional board of school trustees if granting such petition shall make the affected segment of the boundaries of the high school district the territory is proposed

to be annexed to identical, for the entirety of such affected segment, to the boundaries of the elementary school district in which the territory is located.

Any contiguous portion of an elementary school district that constitutes 5% or less of the equalized assessed value of the district and 5% or less of the territory of the district shall upon petition of two-thirds of the registered voters of the territory proposed to be detached and annexed be so detached and annexed by the regional board of school trustees if granting such petition shall make the affected segment of the boundaries of the elementary school district the territory is proposed to be annexed to identical, for the entirety of such affected segment, to the boundaries of the high school district in which the territory is located.

The regional board of school trustees shall have no authority or discretion to hear any evidence or consider any issues except those that may be necessary to determine whether the limitations and conditions of this Section have been met.

No district may lose more than 5% of its equalized assessed value or more than 5% of its territory through petitions filed under this Section. If a petition seeks to detach territory that would result in a cumulative total of more than 5% of a district's equalized assessed value or more than 5% of the district's territory being detached under this Section, the petition shall be denied without prejudice to its being filed pursuant to Section 7-6 of this Code [105 ILCS 5/7-6]. Notwithstanding any other provision of this Section, this paragraph shall apply to any detachments effected pursuant to the provisions of this

Section as they existed prior to the effective date of this amendatory Act of the 91st General Assembly [P.A. 91-46].

(b) At any time prior to the granting of the petition calling for the detachment and annexation of non-coterminous territory under this Section, the Committee of Ten designated in the petition may amend the petition to withdraw the detachment and annexation proposal and substitute in its place a proposal to require the school district from which the territory would have been detached to pay the per capita tuition costs for each pupil residing in the non-coterminous territory to attend the school district to which the territory would have been annexed. If such amended petition is granted, the school district from which the territory would have been detached shall pay to the school district to which the territory would have been annexed the per capita tuition costs as determined under Section 10-20.12a [105 ILCS 5/10-20.12a] for each pupil residing in the territory who chooses to attend the school district to which the territory would have been annexed. Notwithstanding the provisions of Section 10-22.5 [105 ILCS 5/10-22.5], the school district to which the territory would have been annexed shall admit any pupil that resides in the non-coterminous territory and provide such pupils with any services of the school. The payment and collection of tuition and any other such matters as may need to be resolved shall be established by an intergovernmental agreement developed between the two affected school districts. Section 7-6 of this Code [105 ILCS 5/7-6] shall apply to petitions filed under this Section except as otherwise provided in this Section.

The changes made by this amendatory Act of the 91st General Assembly [P.A. 91-46] shall not apply to petitions pending on the effective date of this amendatory Act of the 91st General Assembly [P.A. 91-46].

105 ILCS 5/10-22.5

Sec. 10-22.5. *Assignment of pupils to schools – Non-resident pupils – Tuition – Race discrimination.* To assign pupils to the several schools in the district; to admit non-resident pupils when it can be done without prejudice to the rights of resident pupils and provide them with any services of the school including transportation; to fix the rates of tuition in accordance with Section 10-20.12a [105 ILCS 5/10-20.12a], and to collect and pay the same to the treasurer for the use of the district; but no pupil shall be excluded from or segregated in any such school on account of his color, race, sex, or nationality. Nothing herein shall be construed to permit or empower the State Board of Education to order, mandate or require busing or other transportation of pupils for the purpose of achieving racial balance in any school.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Legislative History of § 7-2b

105 ILCS 5/7-2b is a provision of the *Illinois School Code* which provides for the detachment and annexation of territory from an elementary or high school district. It is this section under which Respondents have filed their petitions to detach a subdivision known as "The Greens"

from Rich Township High School District 227 and annex it to Homewood-Flossmoor High School District 233. Section 7-2b has been amended numerous times. Each amendment to the statute followed the denial of a petition filed thereunder, including the petitions filed by the Defendants from The Greens. Each time § 7-2b was amended after a petition was denied, the requirements of the statute cited for the denial were eliminated. Importantly, following Petitioners' objection to The Greens detachment on the constitutional grounds raised herein, § 7-2b was amended to provide that the agency charged with deciding petitions thereunder is to ignore 105 ILCS 5/10-22.5 (the *Illinois Armstrong Act*) when determining whether to allow the boundary change. The *Illinois Armstrong* Act prohibits the exclusion or segregation of pupils on account of their color, race, sex or nationality. Specifically, the Armstrong Act states as follows:

> Sec. 10-22.5. *Assignment of pupils to schools – Non-resident pupils – Tuition – Race Discrimination.* To assign pupils to the several schools in the district; to admit non-resident pupils when it can be done without prejudice to the rights of resident pupils and provide them with any services of the school including transportation; to fix the rates of tuition in accordance with Section 10-20.12a [105 ILCS 5/10-20.12a], and to collect and pay the same to the treasurer for the use of the district; but no pupil shall be excluded from or segregated in any such school on account of his color, race, sex, or nationality. Nothing herein shall be construed to permit or empower the State Board of Education to order, mandate or require busing or other transportation of

pupils for the purpose of achieving racial balance in any school.

In addition, § 7-2b states that the agency deciding petitions thereunder "shall have no authority or discretion to hear any evidence or consider any issues" except those specifically required by § 7-2b. Finally, although not actually enacted, the following amendment was proposed to be added to § 7-2b on May 12, 1994:

> *If an action or part of an action that arises under or involves the interpretation, application, or validity of this Section raises an issue that arises under or involves an interpretation of the application of the Constitution of the United States or the Constitution of the State of Illinois, only the State's Attorney of the county in which is located all or the greatest part of the territory of the school district that raises, or on whose behalf is raised, a constitutional issue ~~may~~ bring, maintain, or continue, on behalf of that school district, the action or part of the action in which the constitutional issue is raised. The provisions of this subsection apply to actions instituted on or after the affected date of this amendatory act of 1994 and to all actions instituted before that date that remain pending on that date. If there is an action pending on the effective date of this amendatory Act of 1994 to which this subsection applies, the State's Attorney that is authorized under this subsection to bring, maintain, or continue the action or part of the action that raises a constitutional issue on behalf of a school district affected by the action shall file an appearance in the action on behalf of the district with respect to the constitutional issue, and any other attorney of record acting on behalf of the district shall immediately withdraw from representation of the district with respect to that constitutional issue. House Bill 2641.*

B. The Greens

The Greens is located in Olympia Fields, Cook County, Illinois and is presently within the boundaries of Rich Township High School District 227. Children from The Greens attend elementary school in Flossmoor Elementary School District 161 and matriculate in high school at Rich Central High School in School District 227. Rich Central High School's student population is 16.6% Caucasian and 79.5% African-American. Residents of The Greens are 69% Caucasian and 28% African-American. Respondents have requested to alter the high school boundaries so that children from The Greens attend Homewood-Flossmoor High School (School District 233). The students at Homewood-Flossmoor High School are 70% Caucasian and 22.9% African-American.

C. Petitions Filed Under § 7-2b

During the same years that § 7-2b was enacted and amended, a variety of petitions to alter school boundaries were filed thereunder. Each petition involved a group of petitioners from a majority white subdivision seeking to detach from a predominantly black school district and annex to a predominantly white school district.[1] In some cases, the African-American student enrollment at the

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[1] One of the schools involved (Joliet Township School District 204) is not predominantly black. It is 32.3% black and 47% white. However, the petitioners in that case sought to leave School District 204 and annex to a school district that is 0.4% black and 96.7% white.

districts to which the various petitioners were seeking to annex was less than five percent of the total enrollment.

For example, in October 1990, petitioners from Homewood Acres, a residential development located within Bremen Township High School District 228, filed a petition to detach Homewood Acres from School District 228 and annex it to Homewood-Flossmoor High School District 233. In February 1994, the Homewood Acres petition was denied. Hillcrest High School, the attendance center within School District 228 from which the petitioners were seeking to detach, had a student body that was 5.5% Caucasian and 92% African-American. The student body at Homewood-Flossmoor High School District 233 was 70.8% Caucasian and 22.9% African-American.

Prior to the filing of the Homewood Acres petition, the South Cook County Committee for School District Reorganization submitted a plan to the State Superintendent of Education recommending the detachment of Homewood Acres from School District 228 and annexation to School District 233. The State Superintendent of Education rejected the plan. One of the reasons why the plan was rejected is that it failed to ensure that student racial balance in the school districts and attendance centers involved would not be negatively affected.

With respect to the Homewood Acres petition, the State Board of Education found that while the petition for detachment met all the requirements of the *Illinois School Code*, the proposed detachment would be a significant detriment to the schools in the area and the educational welfare of the pupils therein, and, that the detachment would have an incremental segregative impact upon the

affected school districts. The State Board of Education specifically found that the detachment would negatively impact upon the social development of the children in each of the affected school districts because of racial imbalance.

In April 1992, petitioners from the Cherry Hills residential development, located within Joliet Township School District 204, filed a petition to detach Cherry Hills from School District 204 and annex it to Lincoln-Way High School District 210. In October 1992, the Cherry Hills petition was dismissed for failure of contiguity. In March of 1993, § 7-2b was amended to eliminate the contiguity requirement and subsequently, in April 1993, the petitioners from Cherry Hills refiled their petition to detach. In February 1994, the Cherry Hills petition was granted. Forty-seven percent of the student body at Joliet Township School District 204 was Caucasian and 32.3% was African-American. Lincoln-Way High School District 210, the district to which the petitioners from Cherry Hills were seeking to annex, had a student population that was 96.7% Caucasian and 0.4 % African-American.

In September 1992, petitioners from the Bradley Terrace residential development, located in Bloom Township High School District 206, filed a petition to detach from School District 206 and annex to Homewood-Flossmoor High School District 233. The Bradley Terrace petition was subsequently withdrawn by the petitioners. Bloom High School, the attendance center from which the petitioners from Bradley Terrace were seeking to detach, had a student body that was 30.2% Caucasian and 45.3% African-American. The students at Homewood-Flossmoor were predominantly Caucasian.

In June 1993, petitioners from a residential development located within Thornton Township High School District 205 filed a petition to detach from Thornton School District 205 and annex to Thornton Fractional High School District 215. In September 1993, the petition was denied and subsequently reversed on appeal by the Illinois Appellate Court. Thornton Township High School District 205, the district from which the petitioners were seeking to detach, had a student enrollment that was 13.3% Caucasian and 82.6% African-American. The high school to which the petitioners were seeking to annex, Thornton Fractional South High School, had a student population that was 77.6% Caucasian and 14.7% African-American.

In March 1992, a number of citizens living within Proviso Township filed a petition to detach territory from Proviso Township High School District 209 and annex to Riverside-Brookfield District 208. *Jackson v. Cook County Board of School Trustees*, 282 Ill.App.3d 191, 667 N.E.2d 1335 (1st Dist. 1996). In June 1996, the Illinois Appellate Court affirmed the Circuit Court's decision denying administrative review of the Regional Board of School Trustees' denial of the petition for detachment. *Jackson v. Cook County Board of School Trustees*, 282 Ill.App.3d 191, 667 N.E.2d 1335 (1st Dist. 1996). Proviso East High School, the high school within Proviso Township High School District 209 from which the petitioners were seeking to detach, had a student body that was 3.9% Caucasian and 85% African-American. Riverside-Brookfield School District 208, the district to which petitioners were seeking to annex, had a student body that was 89.1% Caucasian and 0.8% African-American.

D. Rich Central and Homewood-Flossmoor High Schools

Rich Central High School, the attendance center from which the residents of The Greens seek to detach, has a total of 1,024 students, of which 16.6% are Caucasian and 79.5% are African-American. Rich Central High School has seen a significant change in the racial composition of its student enrollment over the past ten years. During the 1986-87 academic school year, almost 50% of the students enrolled at Rich Central were Caucasian. Since then, with each passing school year, the number of Caucasian students has decreased while the number of African-American students has risen. Homewood-Flossmoor High School, the high school to which the residents are seeking to annex, has a total enrollment of 2,249 students. 70.8% of those students are Caucasian and 22.9% are African-American.

Both schools offer similar educational opportunities and levels of student tracking. In fact, the Respondents stipulated to the educational equality of both schools.

II. PROCEDURAL BACKGROUND

In January 1992, Respondents, the Committee of Ten, filed their first petition to detach The Greens from Rich Township High School District 227 and annex it to Homewood-Flossmoor High School District 233. The detachment petition was dismissed by the Regional Board of School Trustees for lack of jurisdiction in June 1992. In November 1992, the Respondents refiled their petition

seeking detachment; it was dismissed for failure to comply with hearing board rules under Article 7 of the *Illinois School Code*. One month later, in December 1992, the Respondents refiled the petition for a third time. In April 1993, the third petition to detach The Greens was denied for failure to satisfy the statutory requirements of § 7-2b of the *Illinois School Code*. (105 ILCS 5/7-2b). In December 1993, Respondents refiled their petition to detach for a fourth time. Petitioners removed the petition to federal court in January 1994 to address constitutional issues asserted in opposition to the proposed detachment. In February 1995, the federal court remanded the petition to the Township Trustees of Schools[2] without hearing the constitutional issues. Thereafter, The Greens petition was denied in May 1995 by the Township Trustees of Schools for failure to meet the requirements of § 7-2b. In June 1995, Defendants filed a petition for rehearing pursuant to § 7-6n of the *Illinois School Code*. (105 ILCS 5/7-6n).

On August 30, 1995, the Township Trustees of Schools entered a joint order granting the petition for detachment upon rehearing. Petitioners filed their initial complaint for administrative review and other relief on October 4, 1995. Count I of the complaint sought administrative review of the Township Trustees of Schools' decision granting the petition for detachment, as well as the decision to allow a rehearing. Count II alleged an independent violation of the Equal Protection Clause of the

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[2] Pursuant to Article 7 of the *Illinois School Code* (105 ILCS 5/7-1 *et seq.*), a joint hearing by the following Township Trustees of Schools was required: Bloom, Bremen, Rich and Thornton Townships.

Fourteenth Amendment to the United States Constitution. Count III alleged that the petition for detachment violated Title VI of the *Civil Rights Act of 1964*. Count IV asserted that § 7-2b of the *Illinois School Code* on its face violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

On September 27, 1996, the Circuit Court of Cook County granted Petitioners' complaint in part and remanded the matter to the Township Trustees to require the Trustees to entertain constitutional questions (specifically, whether the petition violated the Equal Protection Clause of the United States Constitution and Title VI of the *Civil Rights Act of 1964*). Petitioners then requested the Circuit Court to rule on their other objections to the petition, including the allowance of a rehearing. On November 15, 1996, the Circuit Court denied these arguments. (Appendix, A-20.)

Thus, pursuant to the remand order, the parties appeared before the Trustees on successive dates beginning May 5, 1997 for a hearing on whether granting the petition pursuant to § 7-2b of the *Illinois School Code* violates the Equal Protection Clause of the United States Constitution and/or Title VI of the *Civil Rights Act of 1964*. On August 28, 1997 the Township Trustees of Schools entered a final administrative decision and order denying the petition for detachment based upon the constitutional and civil rights issues raised by Petitioners. (Appendix, A-27.)[3] On October 1, 1997, Petitioners filed a

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[3] The Thornton Township Trustees found that granting the petition would violate the Equal Protection Clause and Title VI.

motion requesting the Circuit Court to adopt the findings of the Township Trustees of Schools. Respondents filed a cross-motion asking the court to review the decision. On March 4, 1998, the Circuit Court granted Respondents' motion for review and denied Petitioners' motion to adopt the findings of the Township Trustees of Schools, and reversed the order of the Township Trustees of Schools thereby granting the detachment and annexation. (Appendix, A-21.) In that order, the Circuit Court stated that, "Section 5/7-2b does not violate either the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution . . . " and that, "Section 5/7-2b does not violate the Equal Protection Clause of the Fourteenth Amendment." (Appendix, A-22.)

On April 2, 1998, pursuant to 735 ILCS 5/3-111(c), Petitioners filed a motion for findings of fact and conclusions of law directed at the March 4, 1998 order, requesting the Circuit Court to specify the propositions of law upon which its decision was based. On April 24, 1998, the Circuit Court granted the motion and stated that the standard of review applied by the Court concerning the constitutionality of 105 ILCS 5/7-2b was *de novo* review. (Appendix, A-24.) On May 22, 1998, Petitioners filed a motion for clarification of the record stating that it was unclear from the Circuit Court's April 24, 1998 order

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The Rich and Bremen Township Trustees concluded that allowing the detachment would violate Title VI. While the Bloom Township Trustees voted to allow the petition, the joint order denying the same was entered because each of the Township Trustees must approve the requested boundary change in order for it to be effective. *Carver v. Bond, et al.*, 203 Ill.App.3d 799, 561 N.E.2d 135 (5th Dist. 1990).

whether it intended to dispose of all counts of Petitioners' complaint for administrative review. On June 5, 1998, the Circuit Court ordered that its April 24, 1998 order was intended to and did dispose of all counts of the complaint. (Appendix, A-26.)

Notices of appeal were filed on April 2, 1998, May 12, 1998 and June 12, 1998, and were directed at the November 15, 1996, March 4, 1998, April 24, 1998 and June 5, 1998 orders of the Circuit Court. Those appeals were consolidated and the Illinois Appellate Court, on December 30, 1999, affirmed in part, vacated in part, and remanded in part the Circuit Court's rulings. (Appendix, A-2.) The Appellate Court affirmed the non-constitutional issues, vacated the Circuit Court's findings that 105 ILCS 5/7-2b is constitutional on its face and as applied, and remanded the case back to the Circuit Court for further proceedings on the constitutional questions presented (both the facial challenge and the as applied challenge). Specifically, on the issue of the constitutionality of 5/7-2b on its face, the Appellate Court (at Appendix, A-19.) stated that:

> Furthermore, we do not believe the trial court properly ruled upon Count IV of plaintiffs' complaint. Count IV alleged that 7-2b is facially unconstitutional because it violates the Armstrong Act (105 ILCS 5/10-22.5 (West 1994)). As this Count challenges the facial constitutionality of the statute, it is not dependent upon the record developed at the administrative level. The record reveals the circuit court did not conduct any evidentiary hearings regarding this

> claim. Therefore, on remand, we direct the circuit court to develop a record upon which it may soundly base its decision as to Count IV.

Petitioners, asserting that no further proceedings were necessary to address the purely legal question concerning the facial challenge to 105 ILCS 5/7-2b, petitioned the Illinois Supreme Court to exercise its discretionary powers to review the case. On May 31, 2000, the Illinois Supreme Court denied the School District's request for discretionary review.

ARGUMENT

Illinois has never been a *de jure* segregation state. Unfortunately, amendments to 105 ILCS 5/7-2b have created a state-sanctioned process to effect changes in public school boundaries (and, necessarily, the assignment of students to a particular school) which expressly prohibits consideration of the effect upon the racial composition of the school districts. § 7-2b expressly tells the decision-maker and the schools involved to ignore the requirements of the *Illinois Armstrong Act*, 105 ILCS 5/10-22.5, when deciding whether to alter public school boundaries. The *Armstrong Act* follows the principles set forth nearly 50 years ago in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954), and provides that "no pupil shall be excluded from or segregated in any such school on account of his color, race, sex, or nationality." 105 ILCS 10-22.5. § 7-2b also improperly precludes consideration of such issues as racial segregation by directing that the agency has no authority to hear evidence on or consider anything other than whether the statutory criteria for

detachment are met. Among the reasons this Court considers when deciding to exercise its discretionary review include situations, like this, where a state court has decided an important federal question in a way that conflicts with relevant decisions of this Court. Rule 10(c), United States Supreme Court Rules. Not only does 105 ILCS 5/7-2b conflict with *Brown v. Board of Education*, it also violates *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (holding that no statute shall "restrict, abrogate or dilute" the guarantees of the Fourteenth Amendment).

As § 7-2b stands today, and if the proposed boundary change at issue herein is allowed, the Illinois legislature and Illinois courts will have turned *Brown v. Board of Education* on its head. Apparently, it is now acceptable to change public school boundaries in such a manner so as to cause racial isolation by allowing pockets of white neighborhoods to flee otherwise predominantly black schools in order to attend predominantly white schools. Petitioners maintain that § 7-2b is unconstitutional on its face (in violation of Equal Protection Clause) given its clear direction to ignore the *Illinois Armstrong Act* and preclusion of consideration of such issues as racial segregation. A failure to address this issue could set Illinois schools back 50 years to the days of "separate but equal," a result that is clearly unconstitutional.

Surely, the courts should be willing to address and correct this anomaly. However, the Petitioners stand on the footsteps of this Court as their last and final hope for judicial intervention. The United States District Court chose not to hear these issues and remanded the case back to the Township Trustees of Schools. The United States Court of Appeals for the Seventh Circuit, in a one

paragraph order, refused to overturn that remand order. Then, the Trustees of Schools refused to address the constitutional issues raised by Petitioners who were forced to seek administrative review in the Circuit Court of Cook County. The Circuit Court initially refused to address these claims and remanded the case back to the Township Trustees to consider these issues.

Finally, after a lengthy hearing, the four Township Trustees of Schools entered a joint order denying the requested boundary change finding that it violated Title VI of the *Civil Rights Act of 1964*, and/or the Equal Protection Clause. However, the Circuit Court subsequently ignored this order and the findings contained therein, and without having heard or seen a single witness testify, issued a two-page order reversing the Trustees of Schools and allowing boundary change. On Appeal, the Appellate Court vacated this part of the Circuit Court's order, but instead of addressing the very serious (and very ripe) constitutional issues, remanded the case back to the Circuit Court for further evidentiary proceedings. Now seven years into this case, not a single court has taken the time to seriously address these widely important issues. This is why it is extremely important that this Court hear this appeal and address these questions of general importance.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

> person within its jurisdiction the equal protection of the laws.

The Equal Protection Clause has historically served as the basis for prohibiting the segregation of students on the basis of their race in public schools. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954). In addition, the *Illinois School Code* expressly prohibits the segregation of students in public schools on the basis of their race. 105 ILCS 5/10-22.5 (the *Armstrong Act*).

The importance of the Equal Protection Clause and the *Brown* decision are critical to the analysis of this proposed detachment. The Equal Protection Clause serves to ensure equality among all races with respect to the functions of our government. This is particularly significant in the realm of government operated, public schools.

> For most children, the first experience with the legal and political framework of their society is in the school. They know that the public maintains the schools, and that they are required by law to attend. And quite apart from the reading, writing and arithmetic they learn in their schools, they also receive an unspoken message – their society's concern, or lack of concern, for them, and the seriousness, or lack of seriousness, of the principles the society professes.
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> * * *
>
> (A) school system, maintained by law, governed by public officials, supported by public revenues, cannot, by act of commission or omission, permit the young who come into its charge to draw the inference that public authority

> accepts, encourages, or participates in, the division of our society into first-and second-class citizens. Nor can it permit students to come away from their education with grounds to believe that, despite the Pledge of Allegiance, with its phrase, 'one nation, under God, indivisible, with liberty and justice for all,' the schools are content to accept as permanent and incurable a state of distrust and hostility between different races, classes or cultural groups.

Hart v. Community School Board of Education, 383 F.Supp. 699, 729 (E.D.N.Y. 1974).

The harmful effects of segregation upon students is precisely what the Petitioners are striving to avert in this case. Racial separation of our children in public schools negatively impacts both whites and blacks, and that is why the Equal Protection Clause prohibits the separation of students based upon race.

> Segregation of white and [black] children in public schools has a detrimental effect on the [black] children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [African-American] group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of [black] children and deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Brown, 347 U.S. at 494.

Similarly, the harmful effects of separating students based upon their race impacts white students.

> White students may also react to racial isolation in ways harmful to themselves. White pupils are apt to form an irrational attitude of inherent superiority and are apt to develop an unrealistic concept of [a] homogeneous society in which certain values enjoy universal acceptance. Similarly, because of their cultural isolation, segregated white children tend to lose sight of those fundamental values of our constitutional system which, while respecting individual differences, favor free access and wide social mobility to all persons regardless of race, creed, or national origin, and which thereby promote a healthy interchange among persons of different backgrounds.

N.A.A.C.P. v. Lansing Board of Education, 429 F.Supp. 583, 588 (W.D. Mich. 1976).

By amending 105 ILCS 5/7-2b to preclude consideration of compliance with the Illinois Armstrong Act, the Illinois Legislature has effectively barred any school district affected by a 5/7-2b petition from raising the issue of racial segregation. This Court has explicitly forbidden legislative bodies from enacting statutes that "restrict, abrogate, or dilute" the guarantees of the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Clearly, 105 ILCS 5/7-2b violates this fundamental principle by virtue of its prohibition against consideration of issues such as race discrimination in connection with public school boundary changes. This Court should review this case to strike down what amounts to state sanctioned racial gerrymandering of school boundaries.

Moreover, the words of two residents of The Greens further demonstrate the need for this Court to address these important issues. Caucasian Petitioner Keith Cox expressly stated that he signed the petition for detachment because he believed that his property values were too low because of the fact that his home was located in a predominately black high school district. (Appendix, A-137, 138.) He believed that by changing the school boundaries and locating his home in the Homewood-Flossmoor School District (which is predominately white) he would obtain a more favorable return on the investment he made in his home. African-American resident Sterling Burke similarly expressed an improper motive. When asked why he wanted the boundaries changed, Mr. Burke responded that he wanted a better opportunity for his daughter at School District 233 and he did not like the way "they" were trying to change the way his daughter spoke and dressed at School District 227. When asked who "they" were, Mr. Burke responded the African-American students at School District 227. (Appendix, A-143.) The Respondents are attempting to involve the State in a decision to change public school district boundaries based upon considerations of race and their children's exposure to students of a particular race at School District 227. This Court should act to prevent the utilization of 105 ILCS 5/7-2b to assuage such racially based perceptions.

To date, however, no court has been willing to apply these basic, fundamental constitutional principles in light of a record that so overwhelmingly evinces an impermissible purpose for altering public school boundaries. While the Township Trustees of Schools provided lengthy

opinions with detailed factual findings, the Circuit Court brushed everything aside and, in a two-page order that demeaned the issues presented and ignored the record, ruled that the boundary change could proceed. The Appellate Court then ruled that the Circuit Court should not have proceeded in the manner it did, but instead of reversing the decision, it vacated the ruling and remanded the case back to the Circuit Court. While Petitioners believe there is overwhelming evidence in the record to support their claims, and thus allow a ruling on the same, they will now be forced to put on additional evidence in front of the Circuit Court given that it already ruled against Petitioners. Of course, all of this could be obviated if this Court takes this case.

Undoubtedly, the Township Trustees' decision denying the detachment is proper given the admonitions of the courts, the purpose of the Equal Protection Clause, and the evidence presented at the remand hearing. Indeed, the Township Trustees of Schools are the only body to actually receive evidence and see witnesses testify on these issues and the Trustees decided that this boundary change cannot be allowed.

The discriminatory impact of a boundary change under 105 ILCS 5/7-2b is extremely damaging and directly undermines *Brown v. Board of Education*. The impact on the African-American children in this case may be best stated by Petitioners' expert witnesses who testified as follows:

> I think it's saying that the Whites don't want to mix with Blacks. The Blacks aren't as good. There's a message to children who clearly understand what this is all about is that they are

> second class and is conveying to these children, to every child in that high school, that they are second class. (Appendix, A-150.)
>
> It would, I believe, act as a clear signal that they're not quite as good as their neighbor District 233 and that they may be a little Blacker than they ought to be for good quality schooling, and I would hope that wouldn't be the implication, but it would be hard to overcome that if they see portions of their district trying very desperately to get out of it with no apparent educational advantage. (Appendix, A-149.)

105 ILCS 5/7-2b directly abrogates the protections afforded by the Fourteenth Amendment with respect to racial segregation in a public school. This conflicts with this Court's decision in *Katzenbach* and completely contradicts *Brown v. Board of Education*.

CONCLUSION

Based upon the direct conflict between 105 ILCS 5/7-2b's express prohibition against considering the racial impact caused by a change in public school boundaries and this Court's decisions in *Brown v. Board of Education* and its progeny, this Court should exercise its discretion to hear this case. Given the importance of prohibiting the segregation of students based on race in Illinois (and indeed our nation's) public schools, this Court should grant this petition for *certiorari* so that it

may clearly establish that no state may provide the mechanism by which public schools may become segregated.

Respectfully submitted,

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APPENDIX

ILLINOIS SUPREME COURT
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89295

May 31, 2000

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No. 89295 – Board of Education of Rich Township High School District No. 227, etc., et al., petitioners, v. Terrence L. Brown, et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 22, 2000.

FIRST DIVISION
December 30, 1999

No. 1-98-1169 (Consolidated with Case Nos. 1-98-1748 and 1-98-2221)

BOARD OF EDUCATION OF RICH TOWNSHIP HIGH SCHOOL DISTRICT No. 227, COOK COUNTY, ILLINOIS et. al. Plaintiffs-Appellants, v. TERRENCE L. BROWN, et. al., Defendants-Appellees.	Appeal from the Circuit Court of Cook County. No. 95 CH 9540 Honorable John K. Madden, Judge Presiding.

JUSTICE TULLY delivered the opinion of the court:

Defendants are residents of a small residential real estate development and subdivision known as the Greens (Greens) in Olympia Fields, Illinois. Defendants seek to detach the Greens from Rich Township High School District 227 (Rich Township) and annex to Homewood-Flossmoor High School District 233 (Homewood-Flossmoor) pursuant to the provisions of 7-2b of the Illinois School Code. 105 ILCS 5/7-2b (West 1994).

Plaintiffs, Rich Township and Willis Brunson, the former President of the Board of Education of Rich Township District 227, object to the detachment and assert defendants' are racially driven and therefore the grant of this detachment from Rich Township violates the Equal Protection Clause of the United States Constitution as well as Title VI of the Civil Rights Act.

The Illinois School Code permits the residents of a school zone to move the territory from the jurisdiction of one school district to another by petition, provided that two-thirds of the zone's residents approve, the tract contains 10% or less of the valuation of the ceding district, and the resulting district will be contiguous. 105 ILCS 5/7-2b (West 1994).

Section 6-2(b) requires a joint board composed of the board of trustees of each township affected by the proposed detachment and annexation (Joint Board) assemble and conduct an evidentiary hearing on the merits of the filed petition to detach. 105 ILCS 5/6-2(b) (West 1994). There must be a unanimous vote of all affected townships to effect any proposed boundary change. 105 ILCS 5/7-04(a) (West 1994). Four townships were affected by this petition: Bloom, Bremen, Rich and Thornton.

Residents of the Greens have voted four times to detach from Rich and annex to Homewood-Flossmoor between 1992 and 1993; the first two attempts were dismissed by the hearing board for failure to comply with statutory procedural requirements and the third was denied for failure to present evidence regarding the equalized assessed valuation of the Greens.

The fourth petition, which gives rise to the instant proceedings, was filed on December 20, 1993. In January, 1994 plaintiffs countered by filing a petition to remove to Federal Court pursuant to 28 U.S.C. 1331. (28 U.S.C. 1331).

In February, 1995, the Federal Court remanded the matter to the Joint Board holding it did not have proper jurisdiction because an administrative agency is not the

equivalent of a state tribunal for purposes of removal. Consequently no justiciable violation of civil rights had yet occurred.

The Joint Board scheduled and conducted a hearing on the previously filed petitions in May, 1995. Three townships voted to grant the petition for detachment. However, Thornton denied the petition concluding defendants failed to establish the exact number of registered voters residing in the Greens at the time the petition was filed as required by 7-2b. The vote was not unanimous, therefore the petition to detach was denied.

Defendants filed a timely motion for rehearing pursuant to 7-6(n). 105 ILCS 5/7-6(n). The Joint Board granted the motion and ordered defendants to file the written evidence required by the Thornton decision within 10 days. Defendants complied and the Joint Board granted the petition to detach on August 29, 1995.

Petitioners filed a complaint for administrative review in the Circuit Court of Cook County on October 4, 1995. The complaint also contained three separate counts alleging the detachment violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (U.S. Const., amend. XIV) and Title VI of the Civil Rights Act of 1964 (42 U.S.C. sec. 2000d et. seq.) as well as an attack on the facial constitutionality of section 7-2b.

The circuit court affirmed the Joint's [sic] Board's decision to grant detachment based upon the requirements of 7-2b but remanded the matter to the Trustees to "entertain constitutional questions."

Pursuant to the trial court's remand order, the Joint Board conducted hearings regarding the constitutional claims asserted by plaintiffs and rendered a final administrative decision and order denying the petition for detachment on August 28, 1997. Each township rendered a written decision setting forth its findings of fact and conclusions of law as to the constitutional claims. Unanimity of opinion absent, the Joint Board denied the detachment upon consideration of plaintiffs' constitutional challenges.

On March 4, 1998, the Circuit Court entered an order stating in relevant part: "The Township Trustees should have granted the Defendants' petition and allowed the detachment and annexation pursuant to 105 ILCS 5/7-2b. As the Order of November 15, 1996 indicated. Defendants had complied with all of the conditions and requirements of Section 5/7-2(b). The Township Trustees pursuant to Section 5/7-2(b) are not empowered to consider any evidence other than those necessary to determine whether the conditions of the Section had been met. The Order of September 27, 1996 was intended to have the Township Trustees develop a record of constitutional claims and arguments, but not for the purpose of basing the detachment decision on that constitutional record. * * * " The circuit court reversed the Joint Board's decision and granted detachment.

Plaintiffs appeal from the Circuit Court orders entered March 4, 1998, April 24, 1998 and June 5, 1998. This court has jurisdiction pursuant to Supreme Court Rule 301. (155 Ill. 2d R 301).

The issues raised on appeal are whether: (1) the petitions signed by the residents of the Greens are sufficient as a matter of law; (2) the Joint Board conducted a proper hearing; (3) the Joint Board erroneously granted defendants' motion for rehearing; (4) the circuit court applied the proper standard of review; (5) the circuit court erred in reversing the Joint Board's decision; (6) the circuit court improperly disposed of plaintiffs' independent constitutional claims solely based upon the administrative record.

I

The Illinois School Code requires courts to review a detachment decision in accordance with the Administrative Review Act. 105 ILCS 5/7-7 (West 1994); 735 ILCS 5/3-101 *et. seq.* The scope of judicial review extends to all question [sic] of law and fact presented by the record. 735 ILCS 5/3-110 (West 1994); *American Stores Co. v. Illinois Dept of Revenue,* 296 Ill. App. 3d 295 (1998). An agency's factual findings are deemed *prima facie* true and correct and should not be disturbed on review unless they are contrary to the manifest weight of the evidence or legally erroneous. *Sedol Teachers Union v. Illinois Educational Labor Relations Board,* 276 Ill. App. 3d 872 (1995). On the other hand, reviewing courts are not bound by an agency's interpretation of the law. *Coronet Insurance Co. v. Schacht,* 264 Ill. App. 3d 359 (1994).

An administrative agency's decision is deemed contrary to the manifest weight of the evidence only when the court determines that no rational trier of fact could have agreed with the agency's decision after viewing all

the evidence in the light most favorable to the agency. *Board of Education of Schaumberg Community Consol. School Dist. 54 v. Illinois Educational Labor Relations Board,* 247 Ill. App. 3d 439 (1993). The mere fact that an opposite conclusion is reasonable or that the court reviewing an administrative decision might have ruled differently will not justify reversal of administrative findings. *DeCastris v. State Emmployees [sic] Retirement System of Illinois,* 288 Ill. App. 3d 136 (1997). It is not this court's duty to reweigh the evidence or make an independent determination of the facts but instead to determine whether the findings are supported by some evidence. *Caliendo v. Martin,* 250 Ill. App. 3d. 409 (1993).

The first issue to be determined is whether the petitions were invalid because certain signers failed to include a proper statement of their addresses on the petition. Plaintiffs note that most of the signatures on the petitions set forth a street address but fail to include a municipal designation and cite *Board of Education of Wapella Community Unit School District No. 5, De Witt County, et.al. v. Regional Board of School Trustees of McLean-De Witt Counties, et. al.,* 247 Ill. App. 3d 555 (1993), for the general proposition that failure to include a municipal designation along with a street address and signature is a fatal flaw which invalidates that signature. We do not agree with plaintiffs' interpretation of this case.

The *Wapella* court clearly held the "[a]ddresses of petitioners were sufficiently set forth 'if the identify of the registered voter can readily be determined from the address provided * * * .'." *Wapella,* 247 Ill. App. 3d at 558, citing *Board of Education of Wapella Community Unit School District No. 5, De Will County, et. al. v. Regional Board of*

School Trustees of McLean-DeWitt Counties, et. al., 245 Ill. App. 3d 776, 785 (1993). The court did conclude one signature was invalid for failure to include a municipal designation along with a street address, but we believe that conclusion was specific to the facts of that case.

Wapella involved a "substantial rural area" which included several small farm communities and unincorporated areas of Illinois. Conversely, the instant case relates to a very small subdivision located entirely within the village of Olympia Fields, Illinois. Additionally, the face of the petitions contained the legal description of the territory to be detached followed by the descriptive language, "The above-described Territory constitutes the Planned Unit Development subdivision of Olympia Fields, Illinois, known as 'the Greens of Olympia Fields' ". The identify of each and every individual can be readily determined by the name and street address when read in conjunction with the remaining contents of the petition and we therefore hold the signatures to be valid as set forth on the petitions.

Plaintiffs further argue the signatures on the petitions were stale because they were over one year old at the time of the hearing. Section 7-1 of the School Code provides that the signatures on the petition shall not be older than 6 months at the time of the filing of the petition. 105 ILCS 5/7-1 (West 1994). The signatures on the petitions in this case were dated between October 21, 1993 and December 21, 1993. The petition was filed with the Joint Board in December, 1993. Clearly the signatures were obtained well within the six-month time parameter set forth in 7-1 at the time of filing.

However, plaintiffs reason that section 7-1 of the School Code must be read along with section 7-6(b) (105 ILCS 5/7-6(b) (West 1994)) which requires the Joint Board to provide public notice of the receipt of a petition within 30 days of the filing date and section 7-6(f) (105 ILCS 5/7-6(f) (West 1994), which requires the Trustees to act on the petition by scheduling the hearing not more than 15 days after publication of the notice. Thus, plaintiffs conclude that at the time of a hearing, the signatures should not be more than seven and one-half months old. While we agree in principle with the plaintiffs' argument, we also note that there are exceptions, the facts in this case giving rise to one.

The hearing before the Joint Board was delayed because the plaintiffs attempted to remove this matter to Federal Court. Plaintiffs argue that defendants could have filed a motion to remand with the Federal Court and their failure to do so exhibited utter disregard for the timelines set forth in the School Code. We disagree.

The mere filing of a motion does not assure the relief requested therein will be granted. Moreover, the filing of such a motion in this case would not have necessarily resulted in a hearing being held by the Trustees within the time frame as contemplated by the statute and delineated by petitioners. Furthermore, the logical result of plaintiff's argument yields the conclusion that any detachment petition could be defeated by filing a removal petition or initiating another form of collateral attack until sufficient time had passed for the signatures to become stale. The signatures were collected and filed timely in accordance with 7-1 105 ILCS 5/7-1 (West 1994). Therefore, we conclude the signatures were not stale and

defendants' petition was sufficient as a matter of law.

We next consider plaintiffs' claim that the Joint Board did not conduct a "proper" hearing. Specifically, plaintiffs take issue with the fact that defendants did not present any witness testimony. They further contend counsel for defendant rendered testimony regarding the statutory elements.

Plaintiffs rely on *Board of Education of Wellington Community Unit School District No. 7 v. County Board of School Trustees*, 13 Ill. App. 2d 561 (1957), wherein the court defined a proceeding as being a proper public hearing where both parties have a right to appear and give evidence as well as the right to hear and examine witness testimony. Evidence includes statements of a witness under oath, documentary evidence and whatever might be otherwise inspected by the trier of facts. *Wellington*, 13 Ill. App. 2d at 569. The court concluded the school board had merely organized a meeting wherein a "parade of proponents and opponents to the petition stated their wishes." Those individuals were not placed under oath nor were they subject to cross-examination. The opinion does not indicate whether any other evidence was offered or introduced during the proceeding. Consequently, the court reversed the agency decision.

We believe the facts in *Wellington* are inapposite to those in the case at bar. Defendants appeared before the Joint Board and offered into evidence certified documents including maps, poll sheets prepared by the county clerk, and assessed valuation computations prepared by the

county assessor. Plaintiffs' claim of error begs the question, what oral testimony, if any, is necessary to comply with the terms of the statute?

After a review of 7-2b, we conclude that evidence sufficient to comply with its terms could be tendered by officially prepared and certified documents. Not unless and until the authenticity or accuracy of the documents sought to be introduced as evidence was questioned or rebutted would oral testimony be necessary.

As a sub-issue, plaintiffs assert defendants did not present evidence with respect to contiguity and making the boundaries identical. We have reviewed the record and note that it contains certified maps which clearly delineate the boundaries of the districts affected by the proposed detachment. Plaintiffs urge the maps alone are insufficient to meet the evidentiary requirements of 7-2b; yet do not suggest how or why those maps fail.

The party appealing the administrative agency's decision bears the burden of proof and providing a sufficient record to support any claims of error. *King v. Justice Party*, 284 Ill. App. 3d. 886 (1996). In the absence of any specific challenge to the accuracy of any maps presented, we conclude certified maps of the affected areas clearly delineating the boundaries of both the detaching area as well as the existing boundaries of the high school districts are sufficient to meet the evidentiary burden relating to contiguity in 7-2b. See, *School Dist. No. 106, Cook County v. County Bd. Of School Trustees of Cook County*, 48 Ill. App. 2d 158 (1964).

We next consider defendant's contention the Trustees erred in granting defendants' motion for rehearing. section 7-6(n) of the School Code provides, in relevant part:

> "[W]ithin ten days after service of a copy of the order granting or denying the petition, any person so served may petition for a rehearing and, upon sufficient cause being shown, a rehearing may be granted. * * * " 105 ILCS 5/7-6(n)(West 1994).

Petitioners specifically allege defendants failed to make a showing of "sufficient cause" in support of their motion for rehearing and therefore it should have been denied. Defendants' motion for rehearing specifically addressed the alleged evidentiary inadequacies set forth in Thornton Township's decision denying detachment. In sum, Thornton concluded defendants failed to prove the number of registered voters in the Greens. Without this number, an accurate assessment of whether or not 2/3 of those individuals signed the petition could not be made.

At the hearing, defendants submitted a certified list of the registered voters within the entire precinct of which the Greens comprises only a small portion. The Thornton decision concluded, defendants should have produced official documents which calculated the exact number of registered voters residing within the Greens." [R]equiring the Trustees to go through the voter registration list to determine which registered voters were properly residing in the detaching area amounted to transferring the burden of proving the correct number of registered voters from Petitioners to the hearing board."

Section 7-1 of the School Code provides, "[R]egistered voters shall be determined by the official

voter registration lists as of the date the petition is filed. * * * " 105 ILCS 5/7-1 (West 1994). Defendants argued in their motion for rehearing that the lists required by Thornton Township were not "official lists" in that they are not kept in the ordinary course of business in the Cook County Clerk's office; they are special lists not contemplated by the plain language of 7-1. We agree.

This court in *Ambrose v. Thornton Twp. School Trustees*, 274 Ill. App. 3d 676 (1995), addressed this very issue and concluded that the certified voter registration list for the entire precinct was sufficient to set forth a *prima facie* case. The court stated: "[a]lthough it would have been permissible for the [defendants] to have provided testimony or a certificate from the county clerk, the cases cited do not hold that the [defendants] would be unable to meet their burden of proof under section 7-2b in the absence of such evidence." *Ambrose*, 274 Ill. App. 3d at 682. See also, *Seelhoefer v. Regional Board of School Trustees*, 266 Ill. App. 3d 516 (1994); *Augustine v. Regional Board of School Trustees*, 253 Ill. App. 3d 827 (1993) Because *Ambrose* was reversed in part based upon this exact set of facts, we cannot conclude it error to have allowed the supplementation of evidence erroneously required by Thornton. Moreover, whether or not to grant a motion for rehearing is discretionary. We do not believe the Trustees abused their discretion in allowing this motion.

II.

Plaintiffs' complaint for administrative review contains three separate counts advancing constitutional

claims. Count I alleged the grant of detachment violates the Equal Protection Clause of the United States Constitution. Count II asserts detachment violates Title VI of the Civil Rights Act of 1964. Count III contains a facial attack on the validity of § 7-2b.

In reviewing an administrative decision, the trial court exercises a statutory, and not a general appellate jurisdiction. Therefore, its powers are limited to the functions enumerated in 735 ILCS 5/3-111. *Adamek v. Civil Serv. Commission*, 17 Ill. App. 2d 11 (1958). The scope of review extends to all questions of law and fact presented by the entire record however is limited to the evidence adduced at the administrative level. The court may not consider any new evidence. 735 ILCS 5/3-110 (West 1994).

A trial court, reviewing agency action pursuant to the Administrative Review Act, may examine, *de novo*, constitutional issues. *Howard v. Lawton*, 22 Ill.2d 331 (1961). "To hold otherwise would result in piecemeal litigation by first requiring review of an administrative body's decision and then entertaining another action to test constitutionality brought on by such decision." *Howard*, 22 Ill.2d at 333. If the constitutional question raised in the administrative proceedings addresses the fairness of those proceedings or the application of constitutional principles to the facts of the case before the administrative tribunal, the court is bound by the record made at the administrative level. *Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1976); *City of Chicago v. Piotrowski*, 215 Ill. App. 3d 829, 834 (1991). Should the administrative record be insufficient to sustain a ruling on the constitutional claim, the trial court may remand the matter to the agency for

further evidence. 735 ILCS 5/3-111(7) (West 1994); *Reich*, 527 F.2d at 671; *Sanderson v. DeKalb County Zoning Board of Appeals*, 24 Ill. App. 3d 107 (1974).

On the other hand, facial attacks to the constitutionality of a statute are not dependent on the factual record developed by the administrative agency. Therefore, they may be brought without exhaustion of administrative remedies; the court is not confined by the administrative record. *Bank of Lyons v. County of Cook*, 13 Ill.2d 493 (1958); *Phillips v. Graham*, 86 Ill.2d 274, 289 (1981).

Constitutional challenges to an administrative action pursuant to 42 U.S.C. § 1983 may also be may be [sic] raised in a complaint for administrative review. *Howard v. Lawton*, 22 Ill.2d 333 (1961), *Stratton v. Wenona Community Unit Dist. No. 1*, 133 Ill.2d 413, 428 (1990). A § 1983 action is not a review proceeding even when it challenges administrative action that has an adjudicative component. *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985). Such a claim is an original action independent of the administrative review proceeding and is therefore plenary in its scope. *International College of Surgeons*, 91 F.3d at 993; *Stratton*, 133 Ill. 2d at 428; *Hameetman*, 776 F.2d at 640.

The courts have further held such a suit will be entertained both with respect to facial and "as applied" challenges to the administrative action. *International College of Surgeons v. City of Chicago*, 91 F.3d 981, 993, rev'd on other grounds 118 S.Ct. 523 (1997), on remand 153 F.3d 356 (7th Cir. 1998).

We begin our analysis with an examination of the propriety of the trial court's remand of the constitutional issues to the Joint Board. Throughout the hearings on remand, the Joint Board maintained it was without jurisdiction to sit in judgment of the constitutional ramifications of its decision.[1] While this issue is not raised by plaintiffs on appeal to this court, we note this was a disputed issue at both the administrative and trial court levels. Additionally, after carefully reviewing the record, we conclude it is an issue which requires our consideration. The trial court entered the following order on September 27, 1996: "The township Trustees failed to consider constitutional issues raised by Plaintiffs. This action-is remanded to the Township trustees to allow the Trustees to entertain constitutional questions."

While the trial court has the discretion to remand to the administrative agency for further proceedings, (735 ILCS 5/3-111 (West 1994)[2]; *Caliendo v. Martin*, 250 Ill.

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[1] Each of the four townships composing the Joint Board included a jurisdictional statement in its written decision which concluded the Joint Board lacked jurisdiction to entertain constitutional questions. However, the Joint Board convened to hear evidence impacting on the constitutional issues solely because it was ordered to do so by the trial court.

[2] 735 ILCS 5/3-111 (West 1994):

(6) where a hearing has been held by the agency, to reverse and remand the decision in whole or in part, and in such case, to state the questions requiring further hearing or proceedings and to give such other instructions as may be proper;

(7) where a hearing has been held by the agency, to remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it shall appear that such action is just. However, no remandment shall

App. 3d 409, 419 (1993)), remand is appropriate when the record produced as result of the administrative process is clearly inadequate; further findings of fact are required or the agency has failed to sufficiently explain the basis of its decision. (*Figueroa v. Doherty, et. al.*, 303 Ill. App. 3d 46 (1999); *Gallo v. Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996), rehearing and suggestion for rehearing denied, cert. denied 521 U.S. 1129 (1997)).

Further, an administrative agency must accept as constitutional, the statute over which it has jurisdiction. *Wiseman v. Elward*, 5 Ill. App. 3d 249, 257 (1972); *Phelan*, 240 Ill. App. 368 at 373. An agency lacks the authority to invalidate a statute on constitutional grounds or even to question its validity. *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 278 (1998).

However, the only evidence yet to be presented at the point of remand was evidence relating to the constitutional ramifications of the Joint Board's decision and the validity of 7-2b itself. The circuit court had previously affirmed the Joint Board's decision to grant detachment based upon the requirements of 7-2b. Detachment is the only question within the jurisdiction of the Joint Board to decide. In fact, the circuit court acknowledged the Joint

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be made on the ground of newly discovered evidence unless it appears to the satisfaction of the court that such evidence has in fact been discovered subsequent to the termination of the proceedings before the administrative agency and that it could not by the exercise of reasonable diligence have been obtained at such proceedings; and that such evidence is material to the issues and is not cumulative;

Board's lack of jurisdiction in its order of April 24, 1998[3]. That order stated: " * * * Administrative entities, such as the Board of Education of Rich Township High School District, have no authority to decide and are not capable of deciding the legal questions regarding the constitutional validity of Section 5/7-2b. This case was remanded to the Plaintiff Board of Education only to develop *further evidence* upon which the Court could decide the constitutional validity of Section 5/7-2b. This case was not remanded to plaintiff Board of Education to make any findings whatsoever." (Emphasis added).

A trial court is vested with original jurisdiction over pleaded matters which the administrative agency lacks authority to decide (*Troutman v. Keys*, 156 Ill. App. 3d 247 (1987) as well as constitutional issues raised in a complaint for administrative review (*Howard v. Lawton*, 22 Ill. 2d 331, 333 (1961)). Constitutional issues are clearly not within the scope of the Joint Board's authority and we hold the trial court erred in remanding the matter to the agency. A reviewing court cannot expand the jurisdiction of an administrative tribunal by order of remand.

Finally, with respect to the constitutional claims, we vacate the trial court's order of March 4, 1998, and remand for further hearings. Although the Joint Board was not possessed with the authority to entertain the constitutional issues, we recognize that both parties

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[3] We note the administrative tribunal in this matter was composed of the trustees of the four townships affected by the petition, of which Rich Township was one. The Board of Education of Rich Township was not represented on the Joint Board.

expended a considerable amount of time and resources representing their respective positions. We will not therefore require the parties to duplicate their efforts in a new trial before the circuit court. The record developed before the Joint Board may be relied upon by the circuit court in formulating its decision. However, to the extent either party deems necessary, the circuit court shall take evidence relating to the constitutional questions set forth in Counts II and III.

Furthermore, we do not believe the trial court properly ruled upon Count IV of plaintiffs' complaint. Count IV alleged that 7-2b is facially unconstitutional because it violates the Armstrong Act (105 ILCS 5/10-22.5 (West 1994)). As this Count challenges the facial constitutionality of the statute, it is not dependent upon the record developed at the administrative level. The record reveals the circuit court did not conduct any evidentiary hearings regarding this claim. Therefore, on remand, we direct the circuit court to develop a record upon which it may soundly base its decision as to Count IV.

Affirmed in part and vacated in part; cause remanded.

O'BRIEN, P.J. and GALLAGHER, J., concur

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BOARD OF EDUCATION OF RICH TOWNSHIP HIGH SCHOOL DISTRICT NO. 227, COOK COUNTY, ILLINOIS; and WILLIS A. BRUNSON, in his official and individual capacity,	)	No. 95 CH 9540
Plaintiffs,	)	
vs.	)	
TERRENCE L. BROWN, et al.,	)	
Defendants.	)	

COURT ORDER

This matter coming to be heard on Plaintiffs' Motion for Rehearing. Due notice having been given, the parties being represented by counsel, the Court having reviewed memoranda filed by the parties, having heard arguments, and otherwise being fully advised in the premises:

IT IS HEREBY ORDERED:

Plaintiffs' motion for rehearing is denied. The signatures contained for detachment were adequate. The maps and reports used at the hearing were accurate, reliable, and valid. The Trustees did not improperly rely on statements of counsel for petitioners. Finally, the hearing held by the Trustee followed procedural guidelines.

ENTERED:

/s/ John K. Madden
Judge John K. Madden 288
November 15, 1996

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BOARD OF EDUCATION OF RICH TOWNSHIP HIGH SCHOOL DISTRICT NO. 227, COOK COUNTY, ILLINOIS, et al.,	)	No. 95 CH 9540
Plaintiffs,	)	
v.	)	
TERRENCE L. BROWN, et al.,	)	
Defendants.	)	

COURT ORDER

This matter coming to be heard on Plaintiffs' Motion to Adopt the Findings of the Township Trustees of Schools for Bloom, Bremen, Rich and Thornton Townships ("Township Trustees"), and Defendants' Motion for Review of Administrative Hearing Decision. Due notice having been given, the parties being represented by counsel, the Court having reviewed memoranda, having heard arguments, and otherwise fully advised on the premises:

IT IS HEREBY ORDERED:

1. Defendants' Motion for Review of Administrative Decision is granted.

2. Plaintiffs' Motion to Adopt the Findings of the Township Trustees is denied.

3. The Township Trustees should have granted the Defendants' petition and allowed the detachment and

annexation pursuant to 105 ILCS 5/7-2b. As the Order of November 15, 1996 indicated, Defendants had complied with all of the conditions and requirements of Section 5/7-2b. The Township Trustees, pursuant to Section 5/7-2b, are not empowered to consider any evidence other than those necessary to determine whether the conditions of the Section had been met. The Order of September 27, 1996 was intended only to have the Township Trustees develop a record of constitutional issues and arguments, but not for the purpose of basing the detachment decision on that constitutional record. The Plaintiffs' original Complaint for Administrative Review challenged the constitutionality of Section 5/7-2b. However, there was inadequate information for the Court on which to decide the constitutional challenge to the Section, and the record developed by the Township Trustees was to aid the Court to later decide the constitutional issues.

4. Section 5/7-2b does not violate either the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or Title VI of the Civil Rights Act of 1964, and Defendants have complied with all of the technical requirements of Section 5/7-2b, as indicated in the Order of November 15, 1996.

5. Section 5/7-2b does not violate the Equal Protection Clause of the Fourteenth Amendment. To establish a violation of the Equal Protection Clause, the plaintiff must show that the defendant acted with discriminatory intent and that the effect of this action was discriminatory.

6. The facts as developed in the record of the instant Case do not support a finding that the Defendants acted

with discriminatory intent, nor do the facts support a finding that granting the petition would have any discriminatory effect.

7. Section 5/7-2b also does not violate Title VI. To establish a violation of Title VI, a plaintiff must first show that a facially neutral practice has a disparate impact on a group protected by Title VI. If the plaintiff can make that showing, the burden shifts to the defendant to prove that a substantial justification exists for the disparate impact.

8. The Defendants have failed to establish disparate impact in this case with respect to the African-American students at Rich Central High School. Accordingly, there is no further need to rule on the existence of substantial justification for Section 5/7-2b.

9. Finally, the Court notes the fact that the named Defendants have asserted that a group other than themselves will experience a disparate impact, namely the African-American students at Rich Central High School, raises standing concerns. The Township Trustees have not asserted that they will experience disparate impact. As governmental agencies, the Defendant Township Trustees may not have standing to raise either the Equal Protection or Title VI challenge to Section 5/7-2b. Mr. Brunson, as a citizen, School Board member, or resident of the school districts at issue, also may not have standing to raise these challenges to the statute.

ENTER:

/s/ John K. Madden
Judge John K. Madden 288

Dated: March 4, 1998

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BOARD OF EDUCATION OF RICH TOWNSHIP HIGH SCHOOL DISTRICT NO. 227, COOK COUNTY, ILLINOIS, et al.,	)	
Plaintiffs,	)	No. 95 CH 9540
v.	)	
TERRENCE L. BROWN, et al.,	)	
Defendants.	)	

COURT ORDER

This matter coming to be heard on Plaintiffs' Motion for Findings and Conclusion of Law pursuant to 735 ILCS 5/3-111(c). Due notice having been given, the parties being represented by counsel, the Court having reviewed memoranda, having heard arguments, and otherwise fully advised on the premises:

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Findings and Conclusions of Law is granted.

2. The standard of review applied to the constitutional issues in this case is de novo. Administrative entities, such as the the [sic] Board of Education of Rich Township High School District, have no authority to decide and are not capable of deciding the legal questions regarding the constitutional validity of Section 5/7-2b.

3. This case was remanded to the Plaintiff Board of Education only to develop further evidence upon which the Court could decide the constitutional validity of Section 5/7-2b. This case was not remanded to Plaintiff Board of Education to make any findings whatsoever.

ENTER:

/s/ John K. Madden
Judge John K. Madden 288

Dated: April 24, 1998

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BOARD OF EDUCATION OF RICH TOWNSHIP HIGH SCHOOL DISTRICT NO. 227, COOK COUNTY, ILLINOIS, et al.,	)	
Plaintiffs,	)	No. 95 CH 9540
v.	)	
TERRENCE L. BROWN, et al.,	)	
Defendants.	)	

COURT ORDER

This matter coming to be heard on Plaintiffs' Motion for Clarification of the Record. Due notice having been given, the parties being represented by counsel, the Court having reviewed memoranda, having heard arguments, and otherwise fully advised on the premises:

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Clarification of the Record is granted. The April 24, 1998 Order was intended to and did dispose of all three Counts of the Complaint filed by the Plaintiffs.

ENTER:

/s/ John K. Madden
Judge John K. Madden

Dated: June 5, 1998

BEFORE THE TRUSTEES OF SCHOOLS OF RICH, BLOOM, BREMEN AND THORTON TOWNSHIPS

Terrence L. Brown, Carolyn A. Brown, Thomas Vander Luitgaren, Donna J. Vander Luitgaren, Bruce A. Peterson, Kevin J. Woods, Jody L. Woods, Carla J. Inwood, Michael E. C. Moss and Judith L. Moss, as the Committe of Ten,	)
Petitioners,	)
vs.	)
Rich Township High School District 227 and Willis A. Brunson,	)
Respondents.	)

FINAL ADMINISTRATIVE DECISION AND ORDER ON REMAND

THIS CAUSE has come to be heard before the Trustees of Schools of Rich, Bloom, Bremen and Thornton Townships as required by law. The Trustees of Schools have considered the transcript of the hearing and all exhibits relevant to the case. For the reasons expressed in the various decisions attached hereto and incorporated herein, the Trustees of Schools enter their final ORDER as follows:

Bloom Township	to GRANT the petition
Bremen Township	to DENY the petition
Rich Township	to DENY the petition
Thornton Township	to DENY the petition

Pursuant to applicable statutes, the petition is denied if any of the boards of township school trustees vote to deny the petition. Therefore, the petition is DENIED.

THIS IS A FINAL AND APPEALABLE DECISION. THIS DECISION CAN BE REVIEWED IN THE CIRCUIT COURT OF COOK COUNTY BY FILING A COMPLAINT FOR ADMINISTRATIVE REVIEW WITHIN 35 DAYS FROM THE DATE THAT A COPY OF THIS DECISION WAS SERVED ON THE PARTY AFFECTED THEREBY.

Attest:

/s/ Cheryl R. Rossen
Cheryl R. Rossen
Rich Township School Treasurer and
ex-officio Secretary

August 28, 1997

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE TRUSTEES OF SCHOOLS
OF BLOOM TOWNSHIP
COOK COUNTY, ILLINOIS

IN THE MATTER OF A PETITION TO DETACH CERTAIN TERRITORY KNOWN AS THE GREENS OF OLYMPIA FIELDS FROM RICH TOWNSHIP HIGH SCHOOL DISTRICT #227, AND ANNEX SAME TO HOMEWOOD-FLOSSMOOR HIGH SCHOOL DISTRICT #233, IN COOK COUNTY, ILLINOIS	)	Petition filed December 20, 1993 and Refiled on February 22, 1995 (Pursuant to Federal Court Order dated February 14, 1995)

DECISION OF THE BLOOM TOWNSHIP TRUSTEES OF SCHOOLS UPON REMAND

This Board having met pursuant to notice on August 21, 1997, at 6:00 p.m., and the meeting having been continued to and concluded on August 26, 1997, to consider the Constitutional issues of the Petition of the Greens of Olympia Fields to detach from School District 227 and

annex to School District 233, pursuant to remand order of September 27, 1996 in the case of *Board of Education of Rich High School, et al., v. Brown, et al.*, 95 CH 9540, after a joint hearing commenced on March 19, 1997, and concluded on August 19, 1997, together with the Trustees of Schools of Rich, Bremen and Thornton townships and conducted by the Treasurers thereof, pursuant to 105 ILCS 5/7-6 (i), and have considered the transcripts, exhibits, motions, information and presentation of counsel, and being fully advised in the premises renders the following decision by a 2-0 vote of its Trustees:

THE PETITION OF THE TERRITORY KNOWN AS THE GREENS OF OLYMPIA FIELDS TO DETACH FROM SCHOOL DISTRICT 227 AND ANNEX TO SCHOOL DISTRICT 233, IS HEREBY GRANTED, THERE BEING NO FINDINGS OF CONSTITUTIONAL VIOLATION.

DATED: August 26, 1997

JOHN MARKS, PRESIDENT

/s/ John Ross
JOHN ROSS, Trustee

/s/ Matt Cookingham
MATT COOKINGHAM, TRUSTEE

FINDINGS AND MEMORANDUM IN SUPPORT OF DECISION OF BLOOM TOWNSHIP TRUSTEES OF SCHOOLS AFTER CONSIDERING CONSTITUTIONAL ISSUES

INTRODUCTION

In a meeting commenced on August 21, 1997, and concluded on August 26, 1997, by the Bloom Township Trustees of Schools, a Decision was rendered by a 2-0 vote granting the Petition of the Greens of Olympia Fields to detach from School District 227 and annex to School District 233, there being no findings of constitutional violations. For purposes of Administrative Review, the Trustees have chosen to attach their Findings and Memorandum in Support of said Decision, stating the basis therefore.

JURISDICTION

The jurisdiction of this Board to consider constitutional issues is based on the remand order of Judge Madden dated September 27, 1996. This Board had originally found that it did not have authority to consider such issues as an administrative agency for reasons previously stated in the Findings and Memorandum in Support of their original Decision granting the Petition dated May 18, 1995.

In compliance with said remand order, a joint hearing was conducted pursuant to 105 ILCS 5/7-6. The joint hearing was commenced on March 19, 1997, and was concluded on August 19, 1997. The joint hearing was conducted by the Treasurers of each Board. The Trustees then conducted their meeting on August 21 and 26, 1997,

and rendered their decision, based upon the transcripts, exhibits, motions, information and presentation of counsel. Proper notice was given in each instance.

DOCUMENTS AND EVIDENCE CONSIDERED

In arriving at our decision, we considered the following documents and evidence:

I. Pre-Hearing Order of the parties;

II. Transcript of Proceedings of the Joint Hearing conducted on March 19, 1997, April 1, 1997, May 5, 1997, May 12, 1997, May 19, 1997, May 30, 1997, June 2, 1997, June 5, 1997, June 6, 1997, June 9, 1997, June 10, 1997, and August 19, 1997, containing, *inter alia*, the testimony of the following witnesses:

(A) Objector Witnesses:

(1) Brian Knutson, Rich Township Superintendent of Schools (5/12/97);

(2) Edwin Burnett, member of the Board of School District 227 (5/12/97);

(3) Bruce Peterson, male/white resident of the Greens of Olympia Fields, called as an adverse witness pursuant to Section 1102 (5/19/97);

(4) Carla Inwood, female/white resident of the Greens of Olympia Fields, called as an adverse witness pursuant to Section 1102 (5/19/97);

(5) Donna Vander Luitegaren, female/white resident of the Greens of

Olympia Fields, called as an adverse witness pursuant to Section 1102 (5/19/97);

(6) Keith W. Cox, male/white resident of the Greens of Olympia Fields, called as an adverse witness pursuant to Section 1102 (5/19/97);

(7) Mary Ellen McKeowen, female/white resident of the Greens of Olympia Fields, called as an adverse witness pursuant to Section 1102 (5/19/97);

(8) Karen Cooke, female/white resident of the Greens of Olympia Fields, called as an adverse witness pursuant to Section 1102 (5/19/97);

(9) William R. Hazard, called as a expert witness regarding the issue of students separating from their elementary school peers after the 8th grade (5/19/97);

(10) Terrence Brown, male/white resident of the Greens of Olympia Fields, called as an adverse witness pursuant to Section 1102 (5/19/97);

(11) Sterling Burke, male/black resident of the Greens of Olympia Fields, called as an adverse witness pursuant to Section 1102 (5/30/97);

(12) David Richmond, called as an expert witness regarding the issue of real estate valuation differences

between Rich Central and Homewood-Flossmoor School Districts (5/30/97);

(13) Dr. Savio Manatt, male/Indian resident of the Greens of Olympia Fields, called as an adverse witness pursuant to Section 1102 (5/30/97);

(14) Larry Tandy, School District 227 Assistant Supervisor in charge of personnel (5/30/97);

(15) Dr. David Hartman, called as an expert witness in the area of urbanology regarding the issue of impact (6/2/97);

(16) Dr. Marvin Schwartz, called as an expert witness in the area of child psychology regarding the affect of students separating from their elementary school peers after 8th grade (6/2/97);

(17) Anthony Moriarity, Principal of Homewood-Flossmoor High School, called as an adverse witness under Section 1102 (6/5/97);

(18) Wallace A. Brunsen, member of the school District 227 School Board (6/5/97);

(19) Ken Reczkiewicz, Principal of Rich South High School (6/5/97);

(20) Edward Mansfield, Principal of Rich Central High school (6/5/97);

(21) Dr. Riardon, Superintendent of Bremen Township High School District 228 (6/6/97);

(22) Dr. Gary Catalani, Superintendent of Thornton Township High School District 205 (6/6/97);

(23) Ron Patton, Superintendent of Bloom Township High School District 206 (6/6/97).

(B) Petitioner's Witnesses:

(1) Roy Schweinfurth, male/white resident of the Greens of Olympia Fields (6/9/97);

(2) Kevin Woods, male/white resident of the Greens of Olympia Fields (6/9/97);

(3) Anthony Mace, male/black resident of the Greens of Olympia Fields (6/9/97);

(4) Terrence Brown (previously called as an adverse witness by the objectors) (6/9/97);

(5) Terri Saffest, Paralegal for the Petitioner's attorney regarding admission of exhibits (6/9/97).

III. Objector's Exhibits 1 through 51.

IV. Petitioner's Exhibits 1 through 18.

V. Objector's Post-Hearing Brief.

VI. Petitioner's Post-Hearing Brief.

VII. Objector's Reply to Petitioner's Brief.

VIII. Authorities cited by Objector.

IX. Authorities cited by Petitioner.

CONSTITUTIONAL ISSUES CONSIDERED

I. FOURTEENTH AMENDMENT.

1. Whether Objector has *standing* to bring an action for a violation of the equal protection clause of the 14th Amendment.

2. Whether bringing this Petition under 105 ILCS 5/7-2(b) constitutes a *State action*.

3. Whether there is *direct* evidence of discriminatory intent on the part of the *legislature*.

4. Whether there is *direct* evidence of discriminatory intent on the part of the *residents*.

5. Whether there is *indirect* evidence of discriminatory intent on the part of the *legislature*.

6. Whether there is *indirect* evidence of discriminatory intent on the part of the *residents*.

II. TITLE VI.

1. Whether granting the Petition would have a disproportionate, adverse effect upon minorities.

FINDINGS

I. FOURTEENTH AMENDMENT.

1. *Standing*. We find that the Objector has standing. This finding is based on the following:

(a) One of the Objectors is an individual, Willis Brunson;

(b) A School District has standing on its own to bring an action for a violation of the equal protection clause of the 14th amendment, *Cincinnati City School v. State Board* (Ohio App. 10 Dist. 1996), 680 N.E.2d 1061;

(c) Judge Anderson's ruling in the Federal Court case on this matter denying Petitioner's Motion for judgment on the pleadings based on the School District's lack of standing;

(d) The issue of standing was not raised by the petitioner.

2. *State action*. We find that there is a State action, based on the following:

(a) The State legislature passed the Statute under which the Petition is brought;

(b) The residents of the Greens of Olympia Fields used the Statute in order to file this petition.

3. *Direct evidence of discriminatory intent of the legislature*. We find no direct evidence of discriminatory intent on the part of the State legislature in enacting 105 ILCS 5/7-2(b). This finding is based on the following:

(a) A review of the evidence regarding legislative history;

(b) The presumption that the Statute is constitutional on its face;

(c) *Rogers v. Desiderio*, (App. 3 Dist. 1995) 211 Ill.Dec. 547, 274 Ill.App.3d 446, 655 N.E.2d

930, which held there was – no unconstitutional delegation of legislative power to private individuals.

4. *Direct evidence of discriminatory intent of the residents.* We find no direct evidence of discriminatory intent or the part of the residents of the Greens of Olympia Fields. This finding is based on the following:

(a) The testimony of the residents of the Greens of Olympia Fields to the effect that the Petition was brought for the purpose of allowing the children residing in the Greens to attend high school with their grade school peers, the elementary and high school programs are articulated and, therefore, it would be psychologically, socially and educationally beneficial for the children to attend Homewood-Flossmoor High School rather than Rich Central High School.

5. *Indirect evidence of discriminatory intent of the legislature.* We find no indirect evidence of discriminatory intent on the part of the legislature. In considering this issue, we considered the factors cited in Objector's Brief at page 57, in the case of *Arlington Heights*, 97 S.Ct. at p.564:

(a) Historical background of decision.

(b) The specific sequence of events leading up to the challenge of the decision.

(c) Departures from the normal procedural sequence of events.

(d) Departures from the normal substantive sequence of events.

(e) The legislative or administrative history.

(a) Historical background militates toward indirect evidence of discrimination in that each time that the Statute had been used on previous occasions, it had been used to attempt to detach from a blacker high school to a whiter high school. However, if we based our decision solely on this factor, then the Statute would only be able to be used to detach from a whiter high school to a blacker high school. This conclusion would mean that the Statute could only be used based entirely upon racial issues rather than the purpose for which we envision the Statute having been enacted, which is allowing students to attend high schools with their elementary school peers where the other elements of the Statute are met.

(b) We made no findings regarding specific sequence of events relating to legislative intent.

(c) In considering factor number 3, we determined that the normal procedural sequence of events in changing boundaries of school districts was for school boards to make such changes. This militates toward indirect evidence of discriminatory intent. However, if we based our decision solely on this factor, then the Statute would never be able to be used for changing school boundaries. This result would be in direct conflict with our presumption that the Statute is constitutional on its face.

(d) We made no finding regarding normal substantive sequence of events relating to legislative intent.

(e) With regard to legislative or administrative history, we find that the Statute has been changed over the years in order for it to be more easily used as a practical matter. Whether this was racially motivated or whether it was motivated in an attempt to allow the Statute to be used (not just on the books) is a matter of speculation. We simply do not know the motives of the legislature and, therefore, default to our presumption that the Statute is constitutional on its face.

6. *Indirect evidence of discriminatory intent of the residents.* We find no indirect evidence of discriminatory intent on the part of the residents. We considered the same factors as stated above and base this finding on the following:

(a) Historical background has been discussed above.

(b) With regard to the specific sequence of events, we find that in this case, the Greens of Olympia Fields was a new subdivision and that the residents of the Greens were racially integrated with 31% of the total population being minority and 44% of the homeowners being minority. 44% of the school age children were minority. Their reasons for bringing this Petition were not racially motivated.

(c) Departure from normal procedural sequence of events has been discussed above.

(d) With regard to departure from normal substantive sequence of events, we find the residents used the Statute in the manner and for the purpose that it was intended. We determined that the testimony of the residents was credible and that their use of the Statute was for psychological, social and educational purposes rather than for racially motivated purposes.

(e) Legislative or administrative history has been discussed above.

II. TITLE VI.

1. We find no disproportionate, adverse effect on minorities. This finding is based on the following:

(a) There would be virtually zero percentage change in the racial mix of Rich Central High School in losing the racially integrated students of the Greens of Olympia Fields. There would be virtually zero percentage change in the racial make-up of the student population of Homewood-Flossmoor High School by receiving the students of the Greens of Olympia Fields.

(b) The number of high school age students in the Greens of Olympia Fields is small, there being from zero to six in any four year period over the brief history of the Greens. The Greens is the only area where students attend Parker Junior High School and go to Rich Central High School.

(c) We find no evidence to support the claim that granting the Petition would have an adverse psychological effect on the students

of Rich Central High School based on race. The Greens is an integrated subdivision. No other Rich Central students feed in from Parker Junior High School. There should be no psychological effect on the Rich Central student body.

CONCLUSION

We do not believe that the legislation under which this Petition was brought is racially motivated. We do not believe that the residents of The Greens of Olympia Fields were racially motivated. We do not believe that granting this Petition would have an adverse effect on minorities. For these and the other reasons previously stated, it is the decision of the Bloom Township Trustees of Schools, after considering the constitutional issues, to grant the Petition upon a 2-0 vote of its members.

BEFORE THE TRUSTEES OF SCHOOLS OF BREMEN TOWNSHIP, TOWNSHIP 36, NORTH, RANGE 13 EAST COOK COUNTY, ILLINOIS

Terrance L. Brown, Carolyn A. Brown, Thomas Vander Luitgaren, Bruce A. Peterson, Kevin J. Woods, Jody L. Woods, Carla J. Inwood, Michael E. C. Moss and Judith L. Moss, as the Committee of Ten.	)	No. 93-1
Petitioners,	)	
vs.	)	
Board of Education of Rich Township High School District No. 227, Cook County, Illinois, and Willis A. Brunson,	)	
Objectors.	)	

DECISION AND ORDER ON REMAND OF TRUSTEES OF SCHOOLS OF BREMEN TOWNSHIP

I. INTRODUCTION

This matter is back before the four combined boards of Trustees of Schools for Bremen, Bloom, Rich and Thornton Townships, Cook County, Illinois, on remand from the Circuit Court of Cook County, Case No. 95 Ch 9540, to allow the Township Trustees to entertain constitutional questions.

Petitioners originally filed their first petition under § 7-2b of the Illinois School Code, 105 ILCS 5/7-2b, ("7-2b"), seeking detachment of the "Greens" subdivision

in Olympia Fields, Illinois ("Greens"), from School District 227 ("District 227") and annexation to School District 233 ("District 233") in January 1992. In June, 1992, the petition was dismissed by the Regional Board of School Trustees for failure to meet the statutory notice requirements. Petitioners refiled the petition to detach before the combined boards of the Township School Trustees, as was then required by § 7-2b, in November 1992. This petition was dismissed for failure to follow the Hearing Board's rules of procedure adopted pursuant to § 7 of the Illinois School Code. In December, 1992, Petitioners filed their third petition for detachment. In April, 1993, this petition was denied because the Petitioners failed to submit any evidence regarding the equalized assessed valuation as required by the statute.

Petitioners filed their fourth detachment petition on December 20, 1993. This Petition is the one now before the School Trustees. On January 25, 1994, District 227 filed a petition pursuant to § 1331 of the Federal Code of Civil Procedure (28 U.S.C. § 1331) to remove the Petition for Detachment to federal court in order to present evidence relating to constitutional issues regarding racial discrimination and disparate racial impact if the petition were to be granted. The federal district court determined that it did not have jurisdiction over the Petition and remanded the Petition back to the Joint Board of Trustees for hearing on February 14, 1995.

On March 27, 1995, the Trustees of Schools of Bremen Township held a special meeting, pursuant to the Open Meetings Act, for the purpose of appointing the Township School Treasurer to serve as hearing officer at the

hearing on the disconnection petition before the Joint Board of School Trustees.

Petitioners filed this present Petition under § 7-2b of the School Code. At the time the Petition was filed, the statute provided, in relevant part, as follows:[1]

> Any contiguous portion of a high school district that constitutes 10% or less of the equalized assessed value of the district shall upon petition of two-thirds of the registered voters of the territory proposed to be detached and annexed be so detached and annexed by the regional board of school trustees if granting such petition shall make the affected segment of the boundaries of the high school district the territory is proposed to be annexed to identical, for the entirety of such affected segment, to the boundaries of the elementary school district in which the territory is located.
>
> * * *
>
> The regional board of school trustees shall have no authority or discretion to hear any evidence or consider any issues except those that may be necessary to determine whether the limitations and conditions of this Section have been met.

The joint hearing board convened on March 27, 1995. At that time the four hearing officers from the four townships called the case and considered various motions

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[1] The hearing officers heard evidence and the Joint Board of Trustees made their determinations and issued their opinions in accordance with this version of § 7-2. Our 1995 decision is incorporated into this one by reference.

from the parties, including District 227's Motion to Hear Evidence and Determine Constitutional Issues. The hearing was reset to May 11, 1995. The Trustees determined that § 7-2b only empowers the school trustees to hear evidence and to only consider issues that are necessary to determine whether the requirements of § 7-2b have been met. The statute did not (and still does not) empower the trustees to consider any constitutional issues. Therefore, Petitioners' Motion to Exclude Evidence on Constitutional Evidence was granted and District 227's Motion to Consider Constitutional Issues and Motion to Deny Petition were denied. The Trustees of Schools of Bremen, Rich and Bloom Township granted the Petition and the Trustees of Schools of Thornton Township denied the Petition. Petitioners subsequently filed a timely motion for rehearing under 105 ILCS 5/7-6(n) and included evidence to supplement the record and correct evidentiary shortcomings the Thornton Trustees found in the initial hearing. On August 29, 1995, the Thornton Trustees reversed their decision. Because all four Townships had now granted the Petition to Detach, the Petition was granted.[2]

District 227 subsequently filed a timely complaint for administrative review in the circuit court of Cook County. The Court found that Petitioners and the Petition had met the statutory requirements of § 7-2b; however, the Court remanded the matter to the Trustees for a hearing on the constitutional issues which the Trustees have always

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[2] Under § 7-6(m) of the School Code, there must be a joint order of all four townships granting the petition in order for the petition to be granted.

maintained is not within their purview to consider. The Joint Hearing Board, under a direct order from the Circuit Court, reconvened in April, 1997 to hear evidence on the constitutional issues, specifically the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil rights Act of 1964, 42 U.S.C. § 2000(d), *et.seq.*

II. THE JOINT BOARD OF SCHOOL TRUSTEES DOES NOT HAVE THE AUTHORITY TO CONSIDER CONSTITUTIONAL ISSUES

The only issue before the Trustees on remand from the Circuit Court is whether the granting of this Petition violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. As stated above, the Trustees had determined that evidence regarding racial discrimination could not be considered by the Joint Hearing Board because of the plain language of § 7-2b.[3] Thus, the Trustees' role as an administrative agency for a § 7-2b petition is to simply determine whether the petition meets the statutory requirements. This position is clearly supported by both federal and state law. The Joint Board of Trustees' function is limited to determining whether the petition complies with § 7-2b provisions. It is without authority to decide constitutional issues. *Phelan v. County Officers Electoral Bd*, 240 Ill.App.3d 368, 608 N.E.2d 215, 217 (1st Dist. 1992). Generally, administrative agencies, such as the Joint Board of School Trustees, are without the power or expertise to pass upon the constitutionality of legislative action.

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[3] The pertinent language of § 7-2b is set forth on pace 2 of this Decision.

Oestereich v. Selective Service Bd, 393 U.S. 233, 539 (1958); *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1051-52 (7th Cir. 1991); *Spiegel. Inc. v. Federal Trade Commission*. 540 F.2d 287, 294 (7th Cir. 1976). While every public official has a paramount duty to obey the Constitution, not every such official is competent to interpret the Constitution, and it is therefore a sensible division of labor to confine interpretive questions to judicial oficers. *Alleghany Corp.*, 896 F.2d at 1052.

Moreover, the circuit court possesses the jurisdiction to rule on the constitutionality of the state statute. *Phelan*, 608 N.E.2d at 217-218. Illinois law clearly permits those seeking review of administrative agency decisions to also raise federal and state constitutional issues before the circuit court. *Petition to Detach Property, Matter of*, 878 F.Supp. 111, 113-114 (N.D. Ill. 1995); *see also, Troutman v. Keys*. 509 N.E.2d 453, 458, 156 Ill.App.3d 247 (1st Dist. 1987) ("where the administrative agency's decision gives rise to pleaded issues which could not have been considered by the agency, but the record presented to the circuit court permits a fair determination of such issues, then the scope of review by a court of original jurisdiction extends to all questions of law and fact presented under the pleadings by that record); *Rogers v. Desiderio*, No. 94 C 1736, 1994 WL 710785, *5 (N.D.Ill. Dec. 20, 1994) (citing *Head-On Collision Line, Inc.*, 36 Ill.App.3d 263, 343 N.E.2d 534, 538 (1976); *Howard v. Lawton*, 22 Ill.2d 331, 175 N.E.2d 556, 557 (1961)); *Murray v. Board of Review of Peoria County*, 237 Ill.App.3d 792, 178 Ill.Dec. 517, 520, 604 N.E.2d 1040, 1043 (3rd Dist. 1992).

Accordingly, it is still the Trustees' opinion that it is not within our power to determine whether the granting

of the Petition would violate the Fourteenth Amendment and Title VI. Only a court of law can make this determination. However, because we are under a direct court order to hear evidence on the constitutional issues raised by District 227, we are obligated to consider such matters and have reluctantly made a determination.

Pursuant to statute, the Bremen Township hearing officer has provided the Trustees of Schools with the transcripts of proceedings and all exhibits, maps, lists, books and other items and documents presented at the hearing by the Petitioners and School District 227, along with any and all exhibits of the Board. Based on these materials and the evidence and arguments presented at the joint hearing, the Trustees of Schools of Bremen Township find that: (1) the granting of the Petition does not violate the Equal Protection Clause of the Fourteenth Amendment; and (2) the granting of the Petition would violate the provisions of Title VI of the Civil Rights Act of 1964. Therefore, it is our recommendation that the Petition be denied for the reasons set forth below. However, as stated previously, we still maintain that under the cases cited herein, we do not have the authority to make such constitutional determinations, even pursuant to the mandate given us by the Circuit Court. Accordingly, we request that the Circuit Court take our recommendation under advisement, review the record made on remand and make a proper determination as to the Petition's constitutionality, that only a court of law can so do.

III. DISTRICT 227'S MOTION TO DISMISS FOR LACK OF JURISDICTION

At the outset of the hearing by the Joint Board of Trustees to hear evidence on the constitutional issues, District 227 raised the objection that under the 1995 amendment to § 7-2b, the Trustees no longer have jurisdiction over the current Petition. Public Act 89-397 amended § 7-2b to provide that the Petition to detach would now be heard by the State Board of Education rather than the Township Trustees. This amendment became effective as of August 20, 1995. District 227 filed an emergency motion before the Circuit Court. which retained jurisdiction over this matter when it remanded it back to the Trustees for further hearing. The Circuit Court denied District 227's Motion for a Temporary Restraining Order, specifically finding that the amendment to § 7-2b contains a "savings clause" in § 2-3.105a of the School Code. Because the "savings clause" preserves the Township Trustees duties for annexation petitions filed prior to August 20, 1995, the District did not establish a likelihood of prevailing on the merits. *See,* Order of Court, dated April 18, 1997, *Bd. of Education of Rich Township High School Dist. 227 v. Bloom Township Trustees Schools,* No. 97 CH 4630. The Illinois Appellate Court upheld the Circuit Court's Order. *See,* Order of Court, dated May 1, 1997, *Bd. of Education of Rich Township High School Dist. 227 v. Bloom Township Trustees of Schools,* No. 1-97-1401 (1st Dist.).

District 227 subsequently filed a Motion to Dismiss for Lack of Jurisdiction with the Joint Board of Trustees. The hearing officer duly took it under advisement. We have reviewed the Motion and briefs filed by both parties

and hereby deny District 227's Motion to Dismiss. We are in agreement with the Order of the Circuit Court and are under direct orders to hear the constitutional issues before us. Until directed to do otherwise by the Court, we retain jurisdiction over this matter.

Where the language of a statute is plain and unambiguous, courts must give that language effect without considering other indicia of legislative intent. *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 146 Ill.2d 175, 207, 166 Ill.Dec. 10, 585 N.E.2d 1032 (1991). Statutes are presumed to apply prospectively only and will not be given retroactive effect absent clear language within the statute indicating that the legislature intended otherwise. *First of America Bank, Rockford, NA. v. Netsch*, 166 Ill.2d 165, 651 N.E.2d 1105, 1112-1113 (Ill. 1995). Here, the language of the statute is very clear. Section 2-3.105a of the School Code specifically provides that the "State Board of Education shall exercise all rights, powers, duties, and responsibilities previously exercised by regional boards of school trustees under the provisions of Section 7-2b with respect to all petitions filed under that Section ***after*** the effective date of this amendatory Act." (emphasis added). 105 ILCS § 5/2-305a. The Petition currently before the Trustees was filed on December 20, 1993, before the effective date of this 1995 amendment. Thus, this "savings clause" effectively renders any question of retroactive application of the amendment to § 7-2b moot. The "savings clause" clearly intended for the Trustees to retain jurisdiction over all petitions pending at the time § 7-2b was amended in 1995.

IV. SECTION 7-2b IS NOT UNCONSTITUTIONAL ON ITS FACE

District 227 argues that the purpose and intent which underlie § 7-2b of the School Code and the ultimate effect of the Petition if granted are based on motives of racial discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Specifically, the District contends that 7-2b, while facially neutral regarding the racial make-up of schools involved in a boundary petition such as the one currently before the Trustees, is unconstitutional in that its history and application reveal a disproportionately negative impact upon African-Americans. District 227 further argues that the evidence in this case reveals a discriminatory intent on the part of Petitioners. Therefore, as applied to this case, § 7-2b is unconstitutional. Petitioners maintain that the only motivation for the Petition. and therefore for the change in school boundaries. is a desire to have their grade school-age children continue going to school with the same peer group during their high school years.

On its face, § 7-2b is a seemingly innocent statute which allows small portions of high school districts to realign with the underlying elementary districts. Because the Illinois General Assembly does not have a strong committee system. legislative history and intent is not explained to the degree that one would need to declare a statute unconstitutional on its face. Generally, the Illinois house and senate debates are silent and fail to illuminate the purpose behind legislation. District 227 has presented a multitude of circumstantial history of § 7-2b, casting a

dark cloud on it and calling it a mere ruse for racial discrimination; however, this is not enough to declare it invalid on its face.

In *Hart v. Community School of Brooklyn*, 383 F.Supp. 699, 737 (D.C.N.Y. 1974), the court expressed its opinion that segregative design is not material in the sense that it is not essential in proving a violation of the Constitution. Nevertheless, it may be relevant in proving that segregation exists on the theory that people are more apt to accomplish something if they set out to do so. However, we are in agreement with the *Hart* court when it further states:

> As a practical matter it is exceedingly difficult, if not impossible, for a court to ascertain legislative or even executive motive. More to the point, it is virtually impossible for a court to divine the collection of motives which underlies a multi-member school board's various administrative decisions. The method of judicial inquiry is not well suited to group psychoanalysis.

Id. Thus, even if it may be true that each time § 7-2b has been used it has been used to detach a territory from a "black" district to a "white" district, it is also true that § 7-2b could be used to neatly realign boundaries and transfer "quirky" territory between districts where both districts have homogenous enrollments which make any racial motivation impossible. On this record before us, we therefore decline to find § 7-2b unconstitutional on its face and wipe it off the books with a single stroke.

V. UNDISPUTED EVIDENCE REGARDING THE GREENS' PETITION

Petitioners are residents of the subdivision known as the "Greens" of Olympia Fields, which is located in Elementary School District 161. The great majority of District 161 feeds into Homewood-Flossmoor District 233. Cook County, Illinois ("District 233") for high school. The Greens, however, feed into District 227.

Both sides produced a great deal of evidence regarding the racial composition of the two high school districts and the racial makeup of the Greens. In summary. the evidence shows that the racial makeup of the south suburbs is changing from an area that was primarily white to an area that is becoming primarily African-American. This change is reflected in the changing racial makeup of the two school districts. The number of African-American students has increased in both schools, particularly at Rich Central High School. In fact, approximately three years ago, District 227 determined that because of the declining enrollment at Rich Central and the predominance of African-American students attending Rich Central, the attendance zones of Rich Central, Rich East and Rich South should be revised. Rich Central was 80% black and the other two school were predominantly white. In an effort to equalize the black/white enrollment at the three high schools, boundary changes were instituted. After the boundary change, although Rich South's and Rich East's population equalized, Rich Central's population has remained at 80% African-American. This is due to the fact that the African-American feeder population of the communities in Rich Central's attendance area has

increased. (May 30, 1997 P.M. Tr. pp.52-53). From the evidence presented, one may conclude that the areas involved in this Petition and the student population at both schools will remain and/or will become racially mixed at approximately the same proportions as present.

There was contrasting evidence as to the racial makeup of the Greens itself and the children who will be affected by this Petition. The Petitioners submit that the Greens is a racially integrated community, whereas District 227 maintains that it is a predominately white community. While we agree with District 227 that the "total" population of the Greens is more white than African-American, the total "student" population of the Greens is more racially balanced.[4] The student population comes from the single-family detached homes which are populated by successful white and African-American professionals. These homes were all custom-built since 1990 and it is more likely than not that the current population and racial makeup of the single-family detached homes will remain the same. The Greens is a highly desirable and stable integrated community which appears to be free from racial discord.

The parties stipulated to the following evidence regarding the racial makeup of the Greens: As of April 1997, the Greens had a total of 213 residents. Of these

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[4] Evidence was presented that the townhomes located in the Greens have been and are currently populated by "empty nesters" who have no children and that it is more likely than not that this trend will continue in the future. This testimony was unrebutted. We do note that there is one child living in the townhomes.

residents, 146 (69%) are Caucasian, 60 (28%) are African-American and 7 (3%) are Asian. (Jt. Stip. 17). As of April 1997, the Greens had a total of 140 detached, single-family homeowner residents. Of these 78 (56%) are Caucasian, 55 (39%) are African-American, and 7 (5%) are Asian. (Jt. Stip. 17). As of April 1997, a total of 55 children resided in the Greens. Of those 55 children, 16 are pre-school age, 33 are in grades kindergarten though 12, and 6 are college-age. Of those 16 preschool-age children, 11 are white and 5 are African-American. Of those children in grades kindergarten through 12, 18 are white, 12 are African-American and 3 are Asian. Of the 4 high school-age children, 1 is white and 3 are African-American. Of the 6 college-age children, 2 are white and 4 are African-American. (Jt. Stip. 17).

Rich Central High School, the school and attendance center within District 227, which will be affected by the Petition, has a total of 1,024 students. of which 16.6% are white, 79.5% are African-American, 1.6% are Hispanic and 2.3% are Asian/Pacific Islander. (Obj. Ex. No. 31). Homewood-Flossmoor High School in District 233 has a total enrollment of 2,249 students, of which 70.8% are white, 22.9% are African-American, 2.5% are Hispanic. 3.4% are Asian/Pacific Islander, and .3% are Native American. (Obj. Ex. No. 3).

The evidence also tended to show that both schools offer extremely high educational quality programs, similar educational opportunities and levels of student tracking. (May 19, 1997 A.M. Tr. p.206). Petitioners presented no evidence, anecdotal, expert, or otherwise, on the superiority of District 233, and did not disagree that the two

schools were educationally comparable.[5] With these statistics in mind, however, we also recognize that parents and their children make school choices based on intangible and personal factors, including curriculum, extracurricular activities including sports, and location. Despite the expert testimony presented by District 227 to the contrary, we do not doubt the sincerity of the Petitioners who testified that they place a high degree of importance to keeping their children together with their grade school friends. There are doubtless experts who would testify to a contrary opinion to those who did testify.

VI. THE WITNESSES' TESTIMONY

Both parties presented several groups of witnesses. District 227 called several members of the Committee of Ten and Petition signers as adverse witnesses, presented several expert witnesses, Mr. Willis Brunson, the individual named as a plaintiff on administrative review, and called educational officials and employees from District

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[5] The Trustees of Thornton and Rich Townships express the opinion that if this Petition had been brought under §§ 7-1 & 7-2 of the Illinois School Code, it would have probably failed. This provision uses a benefit detriment analysis: requires proof of "no serious harm to the educational resources of either district:" and relies on the "whole child" or "community interest" tests. *See, e.g., Board of Education of Golf School District No. 6th v. Regional Board of School Trustees of Cook County*, 89 Ill. 2d 392, 433 N.E.2d 240 (1982). In all fairness to the Petitioners, we decline to make such an assumption, since Petitioners were not required to present evidence in regard to this standard.

227, District 233, and other school districts that experienced detachment/annexation petitions. Petitioners presented the testimony of individuals who signed the Petition (including several Petitioners who had testified as adverse witnesses), as well as at least one resident of the Greens who was not a signatory to the Petition because he was not a U.S. citizen at the time the Petition was circulated, but supports the Petition.

Each Petitioner who testified, stated that it was his/her desire to see the children residing in the Greens to attend high school with the peers they went to grade school with. The Greens is part of Elementary School District 161, which primarily serves the Village of Flossmoor. Graduates of District 161 attend one of four high schools: Bremen High School District 228; Bloom High School District 206; District 227; and District 233. The overwhelming majority of graduates attend District 233. Currently, students attending public high school from the Greens must attend Rich Central. If the Petition is granted. Greens students would attend Homewood-Flossmoor High School.

Parents who experienced transferring to other schools testified that they had suffered emotional strain upon separation from their peers at 9th grade and wished to avoid a similar situation for their children. Parents also testified as to their children's own experience when they were separated from their peer groups due to moving, going to Rich Central, and various other reasons. Their testimony suggested that the extra-curricular activities at District 233 were superior to District 227, that their children participated in extra-curricular activities that took place at Homewood-Flossmoor High School, and that

District 233 articulates its program with District 161. Petitioners/parents were represented by whites, African-Americans and Asian-Americans, and persons with children in, out and presently attending high school. They represented as a whole, a community of intelligent, educational and professional persons who were free from racial bias and enjoyed living in an integrated neighborhood.

District 227 based its case of racial motivation primarily on the testimony of Keith Cox, who was questioned extensively on his alleged statements to the local newspaper, the *Southtown Economist*. Mr. Cox supposedly stated to the reporter that "I do know that when we were in the process of looking at the Greens, the very high proportion of black children (at Rich Central High School) was causing a problem with declining property values." (Obj. Ex. No. 6, Art. 1). However, Mr. Cox disavowed making that statement and testified that the reporter concocted the quote based on paraphrasing. He admitted that when the reporter asked a question about property values that he did make some reference that he knew of the disparity for a comparable house. He was adamant that he had told the reporter about his desire to see the children attend high school with their peers. (May 19, 1997 A.M. Tr. p.67). Other than the *Southtown* quote, there was no evidence presented linking Mr. Cox to a particular racial motivation or bias. Although Mr. Cox's statement could be considered "politically incorrect" at best, standing alone, it does not form a basis to invalidate the Petition.

District 227 presented several expert witnesses. Dr. William Hazard testified that both Rich Central and

Homewood-Flossmoor high schools are high quality schools that provide comparable educational opportunities. (May 19, 1997 A.M. Tr. p.206). Dr. Hazard further testified that it is in the best interests of the Greens' children to attend Rich Central rather than Hornewood-Flossmoor because they would be exposed to a broader cultural spectrum at Rich Central; that it is in the best interests of the children to separate from their peers at the high school level because they will separate from their friends after high school; and that there is absolutely no need to have students who attend Elementary School District 1621 to attend the same high school as their grade-school peers. (May 19, 1997 A.M. Tr. pp.210-211; 220-221).

Dr. Marvin Schwarz testified that freshman high school students naturally tend to restructure friendships based upon areas of interest and areas of involvement and that this is an important step in the maturation process. (June 2, 1997 A.M. Tr. p.89).

Mr. David Richmond was qualified as an expert home appraiser and testified regarding the relative value of homes in both District 227 and District 233. Mr. Richmond testified that homes have a shorter marketing time in District 233 than the same home in District 227; that there is a distinct difference for prices paid within the Homewood-Flossmoor attendance boundaries than those in the Rich Central attendance boundaries (May 29, 1997 A.M. Tr. pp.63,72); and that the market preference is for the homes in District 233. (Obj. Ex. No.25). However. Mr. Richmond also testified that when he performed the original appraisal of the Greens subdivision in 1987 for the developers and lenders, he did not apply a location

adjustment for school districts; that he did not use homes in the Greens for his market analysis (May 29, 1997 A.M. Tr. pp.83-89); and that when Mr. Richmond performed a market analysis in 1994, he concluded that it would be difficult to pinpoint how much longer or shorter the marketing time would be in the Greens if it was located in District 233 rather than District 227. (Obj. Ex. No. 28).

Dr. Hartmann was qualified as an expert in the area of urban sociology and applied demography. (June 2, 1997 A.M. Tr. p.9-12). Dr. Hartman identified the racial demographics of the general area and the school districts involved, and concluded that the long term effects of the proposed boundary change would be detrimental on the racial diversity and identifiability of both school districts. (June 2, 1997 A.M. Tr. pp.40-41). However, Dr. Hartmann's testimony was in large part based on the 1990 census tract figures which are not currently reflective of the current population of the Greens subdivision. (Obj. Ex. 29).

It should be noted that none of District 227's experts had interviewed any of the residents of the Greens and were not familiar with the racial composition of the Greens subdivision.

Finally, District 227 presented the testimony of several educators, including superintendents and principals. These included employees of District 227, as well as educators from other school districts. These witnesses explained the local geography, the educational and sociological climate at the various schools, the programs offered by the schools, and how different elementary districts fed into the local high schools. The educators

also testified that students who had been "split" from their classmates at the high school level were generally successful athletically, socially and academically and that no special programs were required for these students.

The Trustees find that conflicting expert and parental testimony was presented regarding the psychological impact on grade school classmates being separated upon matriculation to high school. Thus, the evidence for and against giving weight to this issue is inconclusive. Additionally, the intent of Petitioners with respect to race, or for that matter property values, as asserted by District 227, is not accepted as a factor in making this decision. Such assertions by School District 227 are purely speculative. The effect of the ruling on this Petition upon the African-American students who attend Rich Central is controlling.

VII. THE GRANTING OF THE PETITION WOULD NOT VIOLATE THE FOURTEENTH AMENDMENT

A. Standing

The hearing officers *sua sponte* raised the issue of whether District 227 has standing under the Equal Protection Clause of the Fourteenth Amendment. Boards of education and school districts are governmental agencies created by the legislature and subject to its will. *Cronin v. Lindberg*, 66 Ill.2d 47, 4 Ill.Dec. 424, 360 N.E.2d 360, 363 (1977). Generally, school districts, school boards or its superintendent, acting in his/her official capacity have no standing to question the validity of legislation on constitutional grounds. Due process guarantees, in the

ordinary sense, do not extend to such entities. Id. at 363-364. Here, District 227 does not have standing to protest alleged racial discrimination because it is not a member of the class against whom it contends the Petition would discriminate. *Board of Education, School District No. 142, Cook County v. Bakalis*, 54 Ill.2d 448, 299 N.E.2d 737, 746 (1973); *see also City of Elgin v. County of Cook*, 629 N.E.2d 86, 195 Ill.Dec. 778 (1st Dist. 1993). Therefore, the Trustees find that District 217 is prohibited from asserting the constitutional rights of its students.[6] However, after the case was removed to federal court, Willis Brunson was added as a party in his individual and official capacity. In administrative review, Mr. Brunson has continued to be named as a plaintiff in his official and individual capacity. Therefore, the Trustees find that Mr. Brunson, as an individual party plaintiff who resides in District 227 and is an African-American, has standing to bring the equal protection claims under the Fourteenth Amendment.

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[6] District 227 maintains that various facts in this matter have already been determined by Judge Wayne Andersen. Thus, District 227 argues that relitigation of the standing and state action issues are barred by *res judicata*. However, there was no final order or memoranda of law entered on these issues. In fact, on the court's own motion, it questioned whether the federal court had jurisdiction over this matter. The court subsequently entered an order on January 25, 1995 remanding the case to the township school trustees on the basis that the trustees were not the equivalent of a "state court" under the federal removal statute. *See In the matter of Petition to Detach Property: Committee of Ten v. Board of Education*, 874 F.Supp. 200 (N.D.Ill. 1995). Accordingly, the Trustees find that there is no binding decision as to issues of standing and state action.

B. Fourteenth Amendment Standards

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws." Under the Fourteenth Amendment, the courts have viewed racial classifications with "strict scrutiny." *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment. One attempting to prove a violation has the burden of presenting evidence which shows that the offending party has deprived the objecting party of a fundamental right which was accomplished under the color of state law; with discriminatory intent; and with discriminatory effect. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

C. State Action

A party seeking to establish a cause of action under the Fourteenth Amendment must show that its constitutional rights have been violated by persons acting under color of state law. The law is well settled that a private person who acts under the color of state law may be subject to liability under § 1983. (42 U.S.C. § 1983). Generally, however, the private use of state-sanctioned remedies will not rise to the level of state action unless the private party makes extensive use of state procedures with the "overt, significant assistance of state officials."

Apostol v. Landau, 957 F.2d 339, 343 (7th Cir. 1992); *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

Petitioners at all times performed acts as individuals pursuant to procedures provided by § 7-2b of the Illinois School Code to detach from District 227 and annex to District 233. Under the statute they had the right to so proceed. There is absolutely no evidence that Petitioners acted in concert with any state official. Because the actions of Petitioners were done pursuant to or in conformity with § 7-2b procedures, they are distinguishable from "acting under color of state law." *See Board of Education of Independent School District No. 53 of Oklahoma County v. Board of Education of Independent School District No. 52 of Oklahoma County*, 413 F.Supp. 342, 349 (W.D.Okla. 1975). Accordingly, the Trustees find that Petitioners did not act under color of state law and are therefore not "state actors."

But this does not end our inquiry. District 227 also asserts that the School Trustees are state actors. The Seventh Circuit stated in *dicta* that the regional board of school trustees (in Cook County, the township trustees) were the "state's proxy" in a disconnection case where racial issues were raised. *Rogers v. Desiderio*, 58 F.3d 299 (7th Cir. 1995). Under *Rogers*, Trustees find that the state actors are the Trustees and the "state action" requirement has been met.

D. Racial Motivation

Petitioners contend that § 7-2b has been held declared constitutional in *Rogers v. Desiderio*, 274

Ill.App.3d 446, 211 Ill.Dec. 547 (3d Dist. 1995). The court did uphold § 7-2b against a challenge that it improperly gave legislative powers to private persons. The court did not determine the potential unconstitutional effect of racial changes that might occur when a petition is granted under this section of the School Code.

District 227 has focused the alleged discriminatory intent on Petitioners. However, District 227 maintains that if the Trustees approve the Petition that we shall be the body violating the Fourteenth Amendment. In light of its contention, we will first discuss whether there is discriminatory intent on the part of Petitioners. Second, because courts have directed attention to the governmental body "approving" the petition, *i.e., the township trustees, see Lee v. Lee County Board of Education*, 639 F.2d 1243, 1269 (5thCir.1981) (" . . . the relevant state of mind here is not that of the private persons who requested annexation but that of the city council which took official action to approve the petitions."), we shall discuss whether there is discriminatory intent on the part of the Trustees if the Petition is granted.

District 227 argues that the evidence reveals a discriminatory intent on the part of Petitioners so that § 7-2b is at least unconstitutional as applied to this matter. Petitioners claim that their only motivation is a desire to have the Greens grade-school children continue going to school with the same peer group during their high school years. They claim that their children will suffer emotional trauma and other ill effects if they are separated from their friends at the beginning of 9th grade. District 227 dismisses this contention and insists that the Petitioners' concerns for their children are pretextual because their

children would actually benefit by going to a "new" high school and making new social contacts.

There is little direct evidence, if any, which shows that any Petitioner acted out of a racially discriminatory purpose. As previously noted, some Petitioners are African-Americans who are highly-educated, affluent persons living and working in an integrated community. But, the inquiry does not end here. A racially discriminatory purpose may also be proved through circumstantial evidence. District 227 relied heavily on circumstantial evidence, such as other § 7-2b petitions, petitions filed under §§ 7-1 and 1-2 of the School Code, the equivalent quality of the two districts and the racial makeup of the schools involved to build a foundation for its case. District 227 attempted to show that because the two schools were identical except for race, that only race was the reason for preferring one over the other.

First, the Trustees find that because the Greens was created from an unpopulated plot of land, racial changes in the Greens itself did not precipitate a desire by Petitioners to change schools. Until recently, there was no child of any color from the Greens attending any school. Therefore, the Trustees do not find that the racial changes at Rich Central generated a change of heart by the Petitioners, fueled by discriminatory intent aimed at the Rich Central students. Rather, the Trustees find that the desire to change high school districts was simultaneous with the construction of the homes in the Greens subdivision, a result of the "quirky" boundaries of the underlying elementary districts, which inexplicitly placed the unpopulated Greens area in a different high school district than the surrounding elementary districts.

Second, we find that it is reasonable for parents to prefer one school over the other for a multitude of personal reasons, such as distance, attendance patterns by the children's peers, particular course offerings, specific sports programs and other extra-curricular activities. Although District 227 and District 233 are alike in many ways they are two distinct entities with their own separate personalities and identity. Each school has intangible qualities which will cause a reasonable, nonracially motivated person to prefer one over the other.

District 227 did not meet its burden of proof in regard to its Fourteenth Amendment claim. Viewing the evidence as a whole, the Trustees find it more likely than not that Petitioners are not motivated by an impermissible racially discriminatory purpose.

The fact that racially segregated schools exist is not automatically a constitutional violation. *Columbus Bd. of Educ. v. Panache*, 443 U.S. 449, 464, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979). It is a violation when intentional governmental conduct has created or perpetuated the segregative conditions. *Keyes v. School District No.1, Denver, Colo.*, 413 U.S. 189, 213-14, 93 S.Ct. 2686, 2699-2700, 37 L.Ed.2d 548 (1973). Absent statutory segregation in a state, a school district violates the constitution when "school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system." *Id.* at 201, 93 S.Ct. 2694. To establish unconstitutional racial imbalance within a school system, District 227 has to show that the government authorities created or maintained racial segregation in the schools and that their actions were motivated by

segregative intent. *Id*, at 208, 93 S.Ct. at 2697. Causation is established when it is shown that the governmental body's conduct contributed in a substantial manner to the creation or perpetuation of racial segregation. In other words, the governmental body's conduct must have more than a de minimus impact. *People Who Care v. Rockford Bd. of Educ. School Dist. No. 205*, 851 F.Supp. 905, 910 (N.D. Ill. 1994).

The degree of racial imbalance necessary to sustain a constitutional violation is a factual determination that is to be dealt with on a case by case basis. *Hart*, 383 F.Supp at 732. What is or is not a "segregated" school will necessarily depend on the facts of each particular case. *Id.* at 733. The Trustees are not legally responsible if they have only occasionally committed segregative acts and these acts are of trivial importance and bear no significant relation to the modern situation. *N.A.A.C.P. v. Lansing Bd. of Educ.*, 429 F.Supp.583, 591 (D.C.Mich 1976). Thus, the standard must be that the Trustees, to a substantial degree contributed to the creation or maintenance of segregated schooling. Existing policy and practice with regard to faculty, staff, transportation, extracurricular activities and facilities are among the most important indicia of a segregated system. *Id.* at 592; *see also Keyes*, 93 S.Ct. at 2697.

District 227 presented no evidence that there are unequal facilities for Rich Central and Homewood-Flossmoor high schools; there was no evidence that minority teachers were disproportionately assigned to Rich Central because it is predominately black; and there was no evidence presented that Rich Central was inferior in its education of its students. In fact, the evidence

overwhelming [sic] demonstrated that the two schools were more alike than different. As Dr. Schwarz stated in his testimony:

> I observed a very good high school [Rich Central]. I observed a school where I was impressed certainly with academic standards. I sat in on some honors classes and AP classes where I was extremely impressed . . .
>
> I observed a very positive degree of racial mixing in areas like the cafeteria. I was certainly impressed from sitting in classes as to the orientation and value system of the students in terms of being interested in education, very good high school. (June 2, 1997 A.M. Tr. pp.86-87).
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> . . . Rich Central, with its 60 percent of children being essentially middle to upper middle class, is, from a social demographic structure, is not a minority school but is a school, with a very diverse heterogeneous structure.
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> . . . it does not operate as a minority school the same way as, from my experience extensively, in Chicago as consultant to the Chicago Board and multiple agencies . . . (June 2, 1997 A.M. Tr. pp.114-115).

Evidence was also presented that there would be a very minute change in the percentage of Caucasian and African-American students attending Rich Central if the Petition is granted. (Pet. Exs. 3-12). And as stated earlier, the evidence showed that the demographics of the entire area has been gradually changing from a predominantly white to a predominantly African-American population.

Discrimination by others than the Trustees cannot be relied upon as the sole basis for showing a violation by the Trustees. The Trustees' objective in dealing with the issues presented by District 227 is to see that we do not exclude a pupil of a racial minority from any school, directly or indirectly, on the account of race – we cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

District 227's right to relief depends on a showing of more than mere statistical imbalance. The Trustees find that District 227 has failed to demonstrate a discriminatory state action on the part of the Trustees. The Trustees therefore find that no impermissible racially discriminatory purpose exists in this matter and that the proposed disconnection would not violate the Equal Protection Clause of the Fourteenth Amendment.

VIII. THE GRANTING OF THE PETITION WOULD VIOLATE TITLE VI

District 227 also contends that the evidence presented in this case shows that the proposed disconnection will have a detrimental adverse impact on African-Americans in violation of Title VI. One may prove a case of discriminatory impact without proving discriminatory intent. *Metropolitan Housing v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) *et seq.*, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

To establish an Equal Protection Clause violation, a plaintiff must demonstrate that a challenged action was motivated by an intent to discriminate. *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993). Like the Fourteenth Amendment, Title VI also bars only intentional discrimination. However, the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory. *Id.* Thus, the courts have held that there is no need to prove discriminatory intent to prevail in a Title VI claim. *Guardian Assoc. v. Civil Service Commission*, 463 U.S. 582, 103 S.Ct. 3221, 3227, 77 L.Ed.2d 866 (1983). To establish liability under the Title VI regulations disparate impact scheme, a plaintiff must demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI. *Elston*, 997 F.2d at 1410.

Although the majority of Title VI disparate impact cases in the educational context have involved challenges to the classification of students by ability through the use of standardized tests and other methods, courts have also recognized that an increase in the racial identifiability of a school would constitute a disparate impact. *See, Elston*, 997 F.2d at 1415. District 227 has met its burden of proof on Title VI claim. Viewing the evidence as a whole, it is

more likely than not that the proposed disconnection would have a detrimental adverse impact on African-American students at Rich Central.

Racial isolation, whether or not sanctioned by law, damages African-American students by adversely affecting both their attitudes and achievement. The granting of this Petition would decrease the number of potential white students who would attend Rich Central and would have the effect of increasing the duality of the school system. Transfers are deemed to increase the duality of a school system when they increase the racial identifiability of the schools in the system. *Elston*, 997 F.2d at 1418. While the number of students affected by this Petition is small, rights do not diminish in proportion to the number of persons claiming them. If the Trustees were to grant this Petition, it would increase the percentage of African-American students at Rich Central, thus decreasing the racial, economic and social diversity of the school.

Edward V. Mansfield, principal of Rich Central High School got to the heart of this case when he testified:

> . . . A portion of students [Rich Central students] have come up and spoken to me about some of the issues that they feel are on the table . . .
>
> I think they feel from a student's perspective that you're dealing with a race issue and to some degree a money or status issue.
>
> . . . We have a wide variety in terms of diverse students from those students who don't have a very large income to those students who [sic] parents are obviously making a very large income. They see it as an issue where white

> students necessarily don't want to go to school with them or rich kids don't necessarily want to go school with them.
>
> I think some of them feel like its a slap on the face. Obviously, they see it as a derogatory or something that's not held in very high esteem in terms of what our school is all about.
>
> . . . I think if this action comes to fruition, again, I think it going to be a situation where they are going to be very disheartened by it. (June 5, 1997 P.M. Tr. pp.38-40).

Thus, the Trustees find that if the Petition is granted it will have a chilling effect on the morale of the African-American students attending Rich Central High School, and in affect, [sic] tagging it as a "black" and therefore "undesirable" school.

We do not doubt the sincerity of the justification asserted by Petitioners that their children should stay together with their peers from grade school all the way through high school. However, this justification, standing alone, does not substantially outweigh the detriment to the guarantees made by Title VI to the African-American students attending Rich Central High School.

Therefore, the Trustees find that the proposed disconnection from School District 227 would violate Title VI of the Civil Rights Act of 1964.

CONCLUSION

For these reasons, the Trustees of Schools of Bremen Township hereby DENY the Petition to disconnect the

"Greens" territory from Rich Township High School District 227 and annex it to Homewood-Flossmoor High School District 233.

ENTERED this 27th day of August, 1997:

BREMEN TOWNSHIP TRUSTEES OF SCHOOLS

/s/ Ronald Szabo
RONALD SZABO, President

/s/ Kathy McCreery
KATHY McCREERY, Trustee

_____
ELEANOR HEITMAN, Trustee

ATTEST:

/s/ Joseph J. McDonnell
JOSEPH J. McDONNELL,
Bremen Township School Treasurer
and ex-officio Secretary

BEFORE THE TRUSTEES OF SCHOOLS OF RICH TOWNSHIP, TOWNSHIP 35 NORTH, RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN COOK COUNTY, ILLINOIS

Terrence L. Brown, Carolyn A. Brown, Thomas Vander Luitgaren, Donna J. Vander Luitgaren, Bruce A. Peterson, Kevin J. Woods, Jody L. Woods, Carla J. Inwood, Michael E.C. Moss and Judith L. Moss, as the Committee of Ten,	)	No. 93-1
Petitioners,	)	
vs.	)	
Rich Township High School District 227 and Willis A. Brunson,	)	
Respondents.	)	

DECISION AND ORDER ON REMAND

INTRODUCTION

In 1995, this board and its companion boards granted the subject petition to disconnect certain property known as the "Greens of Olympia Fields" from Rich Township High School District 227 ("District 227") and annex it to Homewood-Flossmoor High School District 233 ("District 233"), in Cook County, Illinois.[1] This board denied District

[1] For the sake of brevity, this second decision on remand omits the important recitation of the procedural background of the case and decisions on issues contained in this board's 1995

227's motion to consider its claim that the disconnection would be unconstitutional. District 227 appealed that decision to the Circuit Court of Cook County on administrative review. On September 27, 1996, the court issued an order stating:

> **Plaintiff's complaint for administrative review is granted. The Township Trustees failed to consider constitutional issues raised by plaintiffs. This action is remanded to the Township Trustees to allow the Trustees to entertain constitutional questions.**

Board of Education v. Brown, 95 CH 9540 (Cir. Ct. Cook County, Order of Sept. 27, 1996). Subsequently, the court considered various motions and issued an order explicitly affirming the remainder of this board's decision, dealing with petition signers and the conduct of that hearing.

On remand, this board has followed Judge Madden's order. As the only issues to be tried were the constitutional defenses asserted by District 227, the board reversed the usual order of proof and treated District 227 as the "plaintiff" on remand. District 227's two defenses on remand were: (1) that the disconnection would violate the 14th Amendment to the U.S. constitution; and (2) that the disconnection would violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) *et seq.*

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decision. That decision is incorporated into this one by reference. As the Thornton trustees' decision, rendered two days ago, includes an exhaustive and essentially accurate recitation of the evidence and legislative history, we have not repeated the same detailed presentation in our opinion.

This board considered these defenses at the remand hearing. For the reasons stated below, this board DENIES the petition to disconnect property on the basis that granting the petition would violate Title VI. The board finds also that the disconnection would not violate the 14th Amendment, due to the failure of District 227 to meet its burden of proof regarding discriminatory intent by the petitioners.

The members of this board revere the constitutional principles and laws requiring desegregation and equal opportunity in education. The principles are a cornerstone of our democracy. As trustees of schools, we serve some of the many fine south suburban schools where white, African-American and children of other races learn side by side, and most importantly, learn from each other.

The statute, however, simply does not empower this board to consider constitutional claims. A court of law has expressly ordered us to hear evidence on constitutional issues regarding potential racial discrimination in the public schools.

The remand hearing spanned ten trial days and included testimony from over 25 witnesses. Dozens of voluminous exhibits were admitted. As required by statute, the trustees have received the entire record for their review. All parties had ample opportunity to examine and cross-examine witnesses and no party was rushed in any way. District 227 even obtained subpoenas from the court to compel the attendance of certain witnesses before the hearing officers. All parties received justice and had a full opportunity to present their claims. To

avoid a retrial, we suggest that the court might wish, as part of its resolution of this case, adopt the boards' findings as its own, much like it would the findings of a special master.

District 227 has raised the objection that this board does not have jurisdiction over the current petition. The same law which transferred jurisdiction to the State Board of Education also added 105 ILCS 5/2-3.105a, to state that the State Board would perform the duties previously performed by the Trustees under § 7-2b "with respect to all petitions filed under that section AFTER the effective date of this amendatory act." [emphasis added].

Judge Madden relied on section 2-3.105a in his order denying District 227's request for a temporary restraining order. Judge Madden found that the "savings clause" in the statute allowed us to complete work on the case.

DISCUSSION
THE EVIDENCE

A huge amount of historical statistical evidence was submitted regarding the two school districts involved and for the area of the Greens. Both parties have introduced evidence regarding the racial makeup of the schools and the Greens at the time the petition was originally filed in late 1993 and early 1994. District 227 has also produced a sizable amount of information on the evolution of its own racial statistics tracing as far back as 1986.

The parties stipulated to the evidence regarding the racial makeup of the population in the Greens and of the various school districts. The record reflects this evidence.

The evidence showed that both schools offer programs of extremely high educational quality and similar educational opportunities and levels of student tracking. Indeed, even the petitioners who testified by and large expressed no preference for one school over the other. District 227 presented both district's [sic] report cards, and emphasized many fine programs at both schools. The petitioners, however, presented no evidence, anecdotal, expert or otherwise, on the superiority of District 233, and appeared to agree that the two schools were actually much the same.

THE LEGISLATIVE HISTORY OF SECTION 7-2b

Section 7-2b of the Illinois School Code is a seemingly innocent statute which allows a "quick fix" to realign small portions of high school districts with the underlying elementary districts. District 227 presented an exhaustive circumstantial history of the statute, noting that it has been exclusively used to move areas into school districts with a greater white student enrollment. The statute could also be used between racially homogeneous school districts where this feature would not come into play. The standard for striking down a statute on the grounds requested by District 227 is quite high, and we do not believe it was met in this case.

WOULD THE PROPOSED BOUNDARY CHANGE VIOLATE THE FOURTEENTH AMENDMENT?

A. Standing

The hearing officers *sua sponte* raised the issue of whether District 227 has standing under the Equal Protection Clause of the Fourteenth Amendment. Generally, a school district, school board, or its superintendent acting in his official capacity have no standing to question the validity of legislation on constitutional grounds. However, since Willis Brunson was made a party, we need not reach that issue.

The Board of Education can impute standing from Mr. Brunson. Under federal standing jurisprudence, if one plaintiff has standing, all have standing. This doctrine was enunciated in *Village of Arlington Heights v, Metropolitan Housing Development*, where the high Court stated: "Because of the presence of this plaintiff [who has demonstrated standing], we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit. *Id.*, at 429 U.S. 252, 263, 97 S.Ct. 555, 562, n. 9 (1977). *Also see Gonzales v. North Tp. of Lake County*, 3 F.3d 1412, 1415 (7th Cir. 1996); *Washington Legal Foundation v. Massachusetts Bar Foundations*, 993 F.2d 962, 971-72 (1st Cir. 1993).

B. The Applicable Standards

The Fourteenth Amendment to the United State [sic] Constitution provides that "[n]o State shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws."

One attempting to prove a violation of the equal protection clause has the burden of presenting evidence which shows that the offending party has deprived the objecting party of a fundamental right (in this case, through a racial classification) which was:

1. Accomplished under the color of state law;
2. With discriminatory intent; and
3. With discriminatory effect.

See Village of Arlington Heights v. Metropolitan Housing Development Corporation, 492 U.S. 252 (1977); *Apostol v. Landau*, 957 F.2d 339 (7th Cir. 1992).

C. State Action Requirement

For there to be a valid Fourteenth Amendment claim, there must be a "state actor" who acts "under the color of state law" to effectuate the discriminatory action. The parties have proffered various identities for that state actor in the convoluted underlying statutory scheme. The state actors could be the petitioners themselves, although they are not governmental officials and there has been no evidence they conspired with anyone. The state actors could be the school trustees; another possibility is the county clerk who actually changes the boundaries on his records. Regardless, someone in this process is undoubtedly a state actor. The identification of whom is not important; what is crucial is that there is one. Therefore, we find that the "state action" requirement is met.

D. Racial Motivation

We disagree with petitioners that we are bound by prior decisions holding section 7-2b to be constitutional. *See, e.g., Rogers v. Desiderio*, 274 Ill.App.3d 446, 211 Ill.Dec. 547 (3d Dist. 1995). The potential unconstitutional effect of racial changes was not at issue in those cases. The courts upheld section 7-2b against a challenge that it improperly delegated legislative powers to private persons. *Id.* Therefore, we will consider this issue on the merits.

District 227 argues that the evidence in this case reveals a discriminatory intent on the part of the Greens petitioners, and that therefore § 7-2b is at least unconstitutional as applied in this case and require that the petition be denied.

The Greens petitioners claim that their only motivation was a desire to have the Greens grade school students continue going to school with the same peer group during their high school years. They claimed that their children would suffer emotional trauma and other ill effects if they were so suddenly separated from their friends at the beginning of 9th grade. District 227 contends that the Greens petitioners' concern about high school freshmen is pretextual, because children actually benefit from separation from friends at the high school level by making new social contacts at that time.

There is little direct evidence showing any Greens petitioner acted out of a racially discriminatory purpose. In fact, some of the most active petitioners are themselves African-American. Having little in the way of direct evidence of racially-biased statements by Greens residents,

District 227 relied on circumstantial evidence such as other § 7-2b petitions, the equivalent quality of the two districts and the racial makeup of the schools to build a foundation for its case. In sum, District 227 tried to show that the schools were absolutely identical except for race, and that, thus, only race could be the reason for preferring one over the other.

We find that it is reasonable for parents to prefer one school over the other for a multitude of personal reasons, such as distance, whether elementary school friends also attend the school, particular course offerings and specific sports programs. Like real estate, schools and children are unique. Each has intangible qualities which will cause a reasonable, non-racially motivated person to prefer one over the other.

We find that all the witnesses were credible and testified with candor. The burden of proof on this claim was on District 227. Viewing the evidence as a whole, we find it more likely than not that the Greens petitioners were not motivated by an impermissible racially discriminatory purpose – even one wrung solely from circumstantial evidence. Therefore, we find that the proposed disconnection would not violate the Fourteenth Amendment.

WOULD THE PROPOSED BOUNDARY CHANGE VIOLATE TITLE VI?

District 227 also argues that the evidence in this case reveals that the proposed disconnection would have a

detrimental adverse impact on African-Americans in violation of Title VI. It is possible to prove a case of discriminatory impact without proving discriminatory intent. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1533 (7th Cir. 1990) *citing Metropolitan Housing v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* provides:

> **No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.**

To establish a prima facie case under Title VI, a plaintiff (here District 227) must prove that a facially neutral practice has a disproportionate, adverse effect on minorities. *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1407 (11th Cir. 1993). The burden then shifts to the defendant to establish a substantial, legitimate justification for approving the proposed detachment. *Id.*, 997 F.2d at 1407. If such a justification is shown, the pendulum swings back to the plaintiff to prove that the justification is pretextual. *Id.* 997 F.2d at 1407. There is no need to prove discriminatory intent to prevail in a Title VI claim. *Guardians Assoc. v. Civil Service Commission*, 463 U.S. 582 (1983).

District 227 met its burden of proof on this claim. Viewing the evidence as a whole, we first find it more likely than not that the proposed disconnection would have a detrimental adverse impact on African-American

students at Rich Central and in the community as a whole.

The south suburban area we represent, including Olympia Fields, Flossmoor, Homewood, Park Forest, Richton Park and other municipalities, is perhaps unique in metropolitan Chicago in that it contains many integrated communities in which persons of all races pleasantly interact and associate with each other in their churches, schools, social organizations and businesses.

Despite that favorable climate, our society and our immediate community are hardly immune from the lingering effects of discrimination which the 14th Amendment and the civil rights laws were enacted to eliminate.

While the number of students affected by this petition is small, rights do not diminish in proportion to the number of persons claiming them. Granting this petition would increase the percentage of African-Americans at Rich Central while diminishing it at Homewood-Flossmoor, decreasing the racial, economic and social diversity at both schools. We agree with the expert witnesses who found beneficial effects when children attending [sic] school in a diverse environment. We also find that granting the petition would have an adverse effect on morale of the African-American students at Rich Central, unfairly tagging it as an "undesirable" school.

The justification asserted by the petitioners is that the students should stay together with their peers from grade school all the way through high school. Many elementary schools split their children at 9th grade. Some students and parents may see a drawback to this separation. However, we believe that the K-12 articulation sought by the

petitioners is not a prerequisite to a quality education. While the parent's [sic] justification has some merit, we believe that it is not so "substantial" as to outweigh the detriment to African-American students guaranteed by Title VI.

Therefore, we find that the proposed disconnection would violate Title VI. Under the Supremacy Clause, Title VI trumps § 7-2b and the petition must be denied.

CONCLUSION

For these reasons, the Rich Township Trustees of Schools DENY the petition to disconnect the "Greens" territory from Rich Township High School District 227 and annex it to Homewood-Flossmore High School District 233.

ENTERED at Olympia Fields, Illinois, on August 28, 1997:

RICH TOWNSHIP TRUSTEES OF SCHOOLS

_____
KEVIN CONLON, Chairman

_____
MIKE JORDAN, Trustee

_____
CALVIN JORDAN, Trustee
Attest:

_____
Cheryl R. Rossen

Rich Township School Treasurer and ex-officio Secretary

BEFORE THE TRUSTEES OF SCHOOLS FOR RICH, BLOOM, BREMEN AND THORNTON TOWNSHIPS COOK COUNTY, ILLINOIS

IN THE MATTER OF THE	)
PETITION TO DETACH	)
CERTAIN TERRITORY FROM	)
RICH TOWNSHIP HIGH	)
SCHOOL DISTRICT 227, COOK	)
COUNTY, ILLINOIS AND	)
ANNEX THE SAME TO	)
HOMEWOOD-FLOSSMOOR	)
DISTRICT NO. 233, COOK	)
COUNTY, ILLINOIS	)

OPINION AND ORDER OF TRUSTEES OF SCHOOLS OF THORNTON TOWNSHIP

This extremely complex matter was originally brought before the four combined boards of the Trustees of Schools for Bremen, Bloom, Rich, and Thornton Townships, Cook County, Illinois[1] in the form of a Petition filed pursuant to § 7-2b of the Illinois School Code. Ill. Comp. Stat., ch. 105, § 5/7-2b (1992). Petitioners are residents of a small residential real estate development and subdivision known as the "Greens" in Olympia Fields, Illinois, which lies wholly within Elementary School District 161. Most of the remainder of District 161 feeds into Homewood-Flossmoor District No. 233, Cook County, Illinois ("District 233") for high school. The Greens, however, is in Rich Township High School District 227, Cook

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[1] Each of the four board of Township School Trustees are sitting as a joint hearing board on this matter because a part of each of the school districts involved is within each of these Townships, Ill. Comp. Stat. ch. 105, § 5/7-04 (1992).

County, Illinois ("District 227" or "Objectors"). In addition, there are other small neighborhoods within District 161 similar in size to the Greens where the high school district is not District 233; some District 161 residents attend schools in Bremen High School District 228, Cook County, Illinois, while others attend Bloom High School District 206. The Petition, however, only involves the Greens, and seeks to detach from District 227 and annex to District 233.

District 227, as Objectors, claim that the purpose and intent which underlie both § 7-2b and the ultimate effect of the Petition if granted are based on motives of racial discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution,[2] and Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000(d) *et seq.* (1996). Specifically, District 227 argues that § 7-2b of the Illinois School Code, while facially neutral[3] regarding the racial make-up of schools involved in a boundary petition such as the one currently before the Trustees, is unconstitutional in that its history and application reveal a disproportionately negative impact upon African-American citizens. District 227 also argues that the evidence in this case reveals a discriminatory intent on the part of the Petitioners, and that § 7-2b

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[2] Although District 227 did not raise the issue, any violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution would also violate Article I, § 2 of the Illinois Constitution.

[3] *But see* the analysis in Section VIII, *infra*, of the latest amendment to § 7-2b, which reveals evidence of discriminatory intent in the language of the statute itself.

is at least unconstitutional as applied in this case. Therefore, District 227 requests that the Trustees deny the Petition.

Petitioners claim that the only motivation for the Petition, and therefore for the change in school boundaries, is a desire to have the grade school students living within the Greens to continue going to school with the same peer group during their high school years. In addition, Petitioners claim that Illinois Courts have already, determined that § 7-2b is constitutional. Therefore, Petitioners argue that the Trustees ostensibly do not need to rule on the constitutionality of the Petition, or § 7-2b.

Because of the complexities and tremendous volume of evidence introduced at the hearing regarding the facts and issues surrounding this Petition, there is a need to first explain the legal issues which we are asked to address, and then to lay out a foundation of the context and history of both § 7-2b and the Petition at hand in order to properly analyze the evidence in light of the legal issues. As such, we will structure our opinion as follows:

1. First, we will discuss the standards and procedures which the law requires us to follow in addressing an Equal Protection and Title VI violation, as well as the evidentiary standards and burdens of proof;

2. Second, we need to trace the complicated legislative history of § 7-2b;[4]

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[4] This material was presented as evidence to the Trustees by District 227 during the hearing; where matters relating to the

3. Third, we will similarly trace the history of the Petition in light of this legislative history;

4. Fourth, we will examine the statistical evidence and supporting data regarding the two school districts involved and the area known as the Greens;

5. Fifth, we will examine the history of other petitions filed under § 7-2b to change the boundaries in other similarly situated school districts;[5]

6. Sixth, we must dispose of District 227's ongoing objection regarding the Trustees' jurisdiction over this matter in light of the most recent amend to § 7-2b; the issues surrounding District 227's standing to bring an action for violation of the Equal Protection Clause; and the Petitioners' claim that Illinois case law has already proclaimed § 7-2b constitutional;

7. Seventh, we will discuss the witnesses presented by both parties, including the testimony of the Petitioners, several educators, and the expert witnesses presented by District 227; and

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statute and its legislative history were not accepted as evidentiary exhibits, the Trustees recognize that the text of the Illinois Compiled Statutes and any published legislative history can be judicially recognized as true and reliable by the Trustees.

[5] These materials were also presented as evidence by District 227, or can be judicially recognized from the court records and previous hearings involving this Petition, much of which wa conducted in prior hearings before the Trustees.

8. Finally, we will examine all of the evidence and information in light of the case authority and determine if the accusations raised by District 227 have merit, which would require us to deny the Petition.

I. THE STANDARDS, PROCEDURES, AND EVIDENTIARY SCRUTINY OF AN EQUAL PROTECTION AND TITLE VI CLAIM BY THE TOWNSHIP TRUSTEES OF SCHOOLS.

A. The Question of Administrative Agencies Making Constitutional Determinations.

The only issue before the Trustees at this time is the constitutionality of the Petition and § 7-2b in light of the evidence presented by District 227. This was mandated by the Order of the Circuit Court of Cook County (*Bd. of Educ. of Rich Township High School Dist., et al. v. Brown*, No 95 CH 9540 (Circuit Court of cook County, IL), Order of Court dated September 27, 1996), which remanded the case back to the Trustees. The Petition had been brought before the Circuit Court on Administrative Review by District 227 after the Trustees had previously voted to allow the Petition.[6] Prior findings of the Court specifically held that all of the express, technical requirements of § 7-2b[7] had been meet [sic] by the Petitioners, and that the only issues which the parties were to present to the Trustees as the hearing board were the matters related to constitutionality and alleged racial discrimination. This is

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[6] The complete procedural history of the Petition is discussed in Section III, *infra*.

[7] These requirements are discussed in Section II, *infra*.

purportedly because the Trustees refused to hear this evidence when the Petition was finally argued before the Trustees in May, 1995, and the Court apparently wants to complete the record on Administrative Review.

In the course of allowing and granting the Petition the last time these matters were at issue before the Trustees, the hearing officers and Trustees determined that evidence regarding racial bias, (or any evidence rising to the level of a constitutional violation), could not be considered by the hearing board on a § 7-2b petition. This was because the express language of the statute required that we ignore any evidence outside of the statutory criteria found in § 7-2b. The plain language of § 7-2b would not allow us to hear any evidence outside of the petition's technical criteria; our only job as an administrative agency for a § 7-2b petition was to simply determine if the Petition was in proper form.[8] Further, administrative bodies such as the Trustees of Schools technically do *not* have the authority to make such a constitutional determination. *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 539 (1958); *Alleghany Corp. v. Haase*, 896 F. 2d 1046, 1051-52 (7th Cir. 1990), *vacated in part as moot sub nom Dillon, Commissioner, Indiana Dept. Of Insurance v. Alleghany Corp.*, 499 U.S. 933 (1991); *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991); *Spiegel, Inc. v. Federal Trade Commission*, 540 F.2d 287, 294 (7th Cir. 1976). There is some Federal case authority which stands for the premise that where a party is seeking redress for constitutional violations, and the evidence of such violations appear in the administrative record, the reviewing court can

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[8] *Id.*

remand the matter back to the administrative agency for further evidence. *See Reich v. City of Freeport*, 527 F. 2d 666 (7th Cir. 1975). We believe, however, that this principle is distinguishable from the case at hand because the agency in *Reich* was only considering factual evidence, and letting the reviewing court make the constitutional decisions. Here, we are accomplishing a *de novo* review of § 7-2b and its application to the Greens, and are ostensibly being asked to decide whether the statute or its application is constitutionally infirm. Deciding whether the Petition or the statute is constitutional is technically not within our power to determine. Only a court of law can make this kind of determination.

However, a court of law has rendered an order expressly instructing us to hear evidence on constitutional issues regarding potential racial discrimination in the public schools. We are required to render a decision based upon that evidence. We therefore are obligated to consider such matters in light of the Court's instructions and our own understanding of the Trustees' authority as an administrative agency to make constitutional determinations. The issue of the effect of the current Petition on the racial makeup of the two affected districts has always really been a necessary and relevant component in this process, despite the mandates of the statute.

The Thornton Township Trustees of Schools are elected officials, with a duty, sworn by oath, to defend the Constitutions of the United States and the State of

Illinois.[9] As residents and businessmen in Chicago-area suburban communities bordering the area affected by this Petition, we know all too well that skin color can often have a great deal to do with decisions made regarding where people live and send their children to school. The allegations of District 227's pleadings regarding the issues of the discriminatory and segregative effect of the Petition are serious, and, if the granting of this Petition would likely have an adverse effect on the racial balance of the two districts involved, would probably be illegal. As elected officials and public servants, we have a duty to uphold the principles found in the Constitution. Congress, our State legislature, and the courts have continually required our public schools, the administrators that run them, and the men and women elected to oversee them to prevent the racial imbalance of students within the schools. The accusations and evidence presented by

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[9] The Supremacy Clause of the Constitution states that "The Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . . the members of the several State Legislatures, and all executive and judicial Officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. Constitution, Art. VI. A similar provision, outlining the specific wording of the oath, is found in Article XIII, § 3 of the Illinois Constitution. This necessarily implements the Fourteenth Amendment and the Equal Protection Clause. If a state statute conflicts with clearly established constitutional principles, the Trustees are obligated by the oath required by Article VI to choose to uphold the constitutional principle, particularly in matters of racial discrimination and school segregation. *Brewer v. Hoxie School District No. 46*, 238 F. 2d 91 (8th Cir. 1956).

District 227 (as discussed herein) ostensibly show that this Petition would have an unpropitious affect [sic] on the minority students of the two schools and the minority residents of the two townships involved. As elected officials and citizens, we are remiss if we stand back and allow such a result.

§ 7-2b may clearly state that we cannot consider evidence of racial bias or impact, but the clear dictates of the Constitution cannot be ignored. If this legislation is used to facilitate the evils of racism in our communities, We have an obligation, both to the citizens of our respective Townships and the Circuit Court of Cook County (which retains competent jurisdiction over this matter), to properly deal with the constitutional issues raised by such a petition.

Thus, we must set out the proper parameters of our decision in this case. In examining the evidence in light of the standards set forth in Section I(B), *infra*, if we determine that there is evidence of discrimination or segregation in this matter great enough to support an Equal Protection violation, it will require us to deny the Petition. This concept is even more strongly supported when we consider the potential claims brought under Title VI, which prohibits the use of Federal funding by entities which allow discrimination. The Trustees, as the facilitators and managers of public school funds in our Townships, are the conduit of federal funds for each of our respective school districts. Therefore, we are also subject to Title VI's limitations, and we must deny the Petition if we see a Title VI violation.

However, we still believe that *Oestereich* and the other cases cited herein deny us the authority to make constitutional determinations, even within the parameters of Title VI; and even the express order of the Circuit Court of Cook County cannot change that legal reality. But we have heard the evidence. Any finding that § 7-2b or the Greens Petition is the product of what we believe violates the Equal Protection provisions of the Constitution or the statutory vehicles to support the same (*e.g.* Title VI, § 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983)), of the [sic] we will include an *obiter dicta* recommendation and request to the Circuit Court to review the evidence which was presented to the Trustees and to independently adopt a finding of a constitutional violation as an express order of Court.

B. Evidentiary Standards, Procedures, and Burdens of Proof.

The Fourteenth Amendment to the United State [sic] Constitution provides that "[n]o State shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws." While courts have generally interpreted this clause to impose a general restraint on the use of classifications, whatever the area regulated and whatever the criterion used *(See Dandridge v. Williams*, 397 U.S. 471 (1970)), this has been particularly true of distinctions based on race. While courts will usually uphold a legislative act which classifies or regulates citizens differently based on criteria other than race so long as the means used are reasonably related to the purpose of the law (the "mere rationality

test," *see Railway Express Agency v. New York*, 336 U.S. 106 (1949)), courts have traditionally viewed racial classifications with "strict scrutiny." *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Courts have defined the equal treatment of the races as a "fundamental right" because racial classifications effect [sic] discreet, insular groups with immutable characteristics who have been traditionally discriminated against or politically powerless. *Id. Any* government act which classifies citizens based upon race is analyzed under "strict scrutiny," and will only be upheld if necessary to achieve a compelling government interest. *Id.* The practical reality, however, is that classifications based on race generally fail this "strict scrutiny" standard of evidence.[10]

The party attempting to prove a violation of the equal protection clause has the burden of presenting evidence which shows that the offending party has deprived the objecting party of a fundamental right (in this case, through a racial classification) which was accomplished under the color of state law with discriminatory intent and discriminatory effect. *See Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 492 U.S. 252 (1977); *Apostol v. Landau*, 957 F.2d 339 (7th Cir. 1992). The party attempting to prove a Title VI violation must prove a facially neutral practice has a disproportionate and adverse effect upon a group protected by Title VI – in this case, African Americans. *Elston v Talladoga County Bd.*

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[10] The one notable exception would be approved affirmative action programs. *See Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987) (employment); *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971) (school enrollment).

of Educ., 997 F.2d 1394 (11th Cir. 1993). The burden then shifts to the offending party to present evidence that a substantial and legitimate justification for the offending practice exists. *Id.* There is no need to prove discriminatory intent to prevail in a Title VI claim. *Guardians Assoc. v. Civil Service Commission*, 463 U.S. 582 (1983).

II. THE HISTORY OF § 7-2b.

Prior to the enactment of § 7-2b, §§ 7-1 and 7-2 of the Illinois School Code controlled the ability of citizens to alter boundaries between school districts. School district boundaries could be changed by detachment, annexation, division, dissolution, or any combination of these methods. Ill. Comp. Stat. ch. 105, §§ 7-1, 7-2 (1996). The regional boards of school trustees or the township school trustees, as the case may be, are authorized to change the boundaries of schools under their jurisdiction when one of the following occurs:

1. The school boards of each district affected petition the Trustees;
2. A majority of the registered voters in each district affected petitions the Trustees;
3. Two-thirds of the registered voters within any area seeking to be detached from one or more districts petitions the Trustees; or
4. the Trustees are petitioned by one district (or several districts) which proposes to annex to another. *Id.*

Under §§ 7-1 and 7-2, the Trustees were required to consider specific evidence besides the number of signatures and registered voters in the area to be detached

before allowing a detachment petition. The Trustees had to consider the best interests of the pupils in the entire area, as well as for the districts affected by the petition. The benefits to the annexing district had to clearly outweigh the detriments to the losing district and the surrounding community as a whole. There could not be evidence of serious harm to the educational resources of either district. *Id.; Board of Education of Golf School District No. 67 v. Regional Board of School Trustees of Cook County,* 89 Ill. 2d 392, 433 N.E.2d 240 (1982). In considering the "best interests" of the students, courts looked to the "whole child" or "community of interest" test, which looked to see if there would be increased participation in school activities by the students and their families and whether the educational, social, and extracurricular needs of the students could be satisfied. *Board of Education of Golf School District No. 67 v. Regional Board of School Trustees of Cook County,* 89 Ill. 2d 392, 433 N.E.2d 240 (1982). Parental preference and convenience could be a factor, but could not itself be the sole determination. *Eble v. Hamilton,* 52 Ill. App. 3d 550, 367 N.E.2d 788 (3d Dist. 1977). The Petitioners had the burden of proof in asserting each of these evidentiary standards to the Trustees. *Board of Education of Golf School District No. 67 v. Regional Board of School Trustees of Cook County,* 89 Ill. 2d 392, 433 N.E.2d 240 (1982).

All of this changed with the enactment of § 7-2b, Ill. Comp. Stat. ch. 105 § 5/7-2b (1992). This provision of the Illinois School Code apparently provides for the annexation of noncoterminous territory from an elementary or high school district. It is the section of the code under which the Petitioners have filed the instant Petition to

detach the Greens from District 227 and annex to District 233. When the Illinois General Assembly enacted it on September 20, 1991, § 7-2b read as follows:

> Any contiguous portion of an elementary or high school district that constitutes 10% or less of the equalized assessed value of the district shall upon petition of two-thirds of the registered voters of the territory proposed to be detached and annexed be so detached and annexed by the Regional Board of School Trustees if granting such petition shall make the boundaries of the district the territory is proposed to be annexed to coterminous.

In August 1992, via Public Act 87-969, the Illinois legislature abolished the Regional Board of School Trustees in educational service regions having two million or more inhabitants. Ill. Comp. Stat. ch. 105 § 5/7-04 (1992). The only real effect of this legislation was to eliminate the Regional Board of School Trustees for Cook County. Thereafter, any petition filed in Cook County under § 7-2b (or any section of the school code, for that matter) could no longer be heard by the Regional Board of School Trustees. § 7-04 provided that the local Township Trustees of Schools in Cook County would now take up the duties of and function as the replacement for the Regional Trustees under the Illinois School Code.

In March 1993, via Public Act 87-12700, § 7-2b was amended for the first time. The new § 7-2b read as follows:[11]

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[11] The portions of § 7-2b which were added in March 1993 have been italicized.

> Annexation *of a non-coterminous territory from an elementary or high school district.* Any contiguous portion of an elementary or high school district that constitutes 10% or less of the equalized assessed value of the district upon petition of two-thirds of the registered voters of the territory proposed to be detached and annexed be so detached and annexed by the Regional Board of School Trustees if granting such petition shall make the affected *segment of* the boundaries of the district the territory is proposed to be annexed to coterminous. *The Regional Board of School Trustees shall have no authority or discretion to hear any evidence or consider any issues except those that may be necessary to determine whether the limitations and conditions of this Section have been met.*

The plain and unambiguous language of the statute made it now clear that none of the evidentiary standards which were required under §§ 7-1 and 7-2 could be presented in a § 7-2b petition. Indeed, no other evidence other than the petition's technical requirements were needed to guarantee detachment.

In August 1993, via Public Act 88-386, § 7-2b was amended for the second time. § 7-2b then read as follows:[12]

> Annexation of non-coterminous territory from elementary or high school district. Any contiguous po**r**tion of *a* **an elementary or** high school

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[12] The portions of the August 1993 amendment which add to § 7-2b have been italicized, while deletions are highlighted by bold text to emphasize the changes made from the prior amendment in March of 1993.

district that constitutes 10% or less of the equalized assessed value of the district shall upon petition of two-thirds of the registered voters of the territory proposed to be detached and annexed be so detached and annexed by the Regional Board of School Trustees if granting such petition shall make the affected segment of the boundaries of the *high school* district the territory is proposed to be annexed *to identical, for the entirety of such affected segment, to the boundaries of the elementary school district in which the territory is located* **coterminous.**

Any contiguous portion of an elementary school district that constitutes 10% or less of the equalized assessed value of the district shall upon petition of two-thirds of the registered voters of the territory proposed to be detached and annexed be so detached and annexed by the Regional Board of School Trustees if granting such petition shall make the affected segment of the boundaries of the elementary school district the territory is proposed to be annexed to identical, for the entirety of such affected segment, to the boundaries of the high school district in which the territory is located.

The Regional Board of School Trustees shall have no authority or discretion to hear any evidence or consider any issues except those that may be necessary to determine whether the limitations and conditions of this Section have been met.

In May, 1994, the General Assembly considered the following amendment to § 7-2b:

If an action or part of an action that arises under or involves the interpretation, application, or validity of this Section raises an issue that arises

> under or involves an interpretation or the application of the Constitution of the United States or the Constitution of the State of Illinois, only the State's Attorney of the county in which is located all or the greatest part of the territory of the school district that raises, or on whose behalf is raised, a constitutional issue may bring, maintain, or continue, on behalf of that school district, the action or part of the action in which the constitutional issue is raised. The provisions of this subsection apply to actions instituted on or after the affected date of this amendatory act of 1994 and to all actions instituted before that date that remain pending on that date. If there is an action pending on the effective date of this amendatory Act of 1994 to which this subsection applies, the State's Attorney that is authorized under this subsection to bring, maintain, or continue the action or part of the action that raises a constitutional issue on behalf of a school district affected by the action shall file an appearance in the action on behalf of the district with respect to the constitutional issue, and any other attorney of record acting on behalf of the district shall immediately withdraw from representation of the district with respect to that constitutional issue.

House Bill 2641, 88th General Assembly, Regular Session (1994). At the time the legislature considered adopting this amendment, State Senator Aldo DeAngelis, the sponsor of the bill, and another state senator who ostensibly opposed the bill, had the following discussion:

> SENATOR DeANGELIS: [The proposed amendment] takes into those situations in which a deannexation petition has been filed under [§ 7-2b of the Illinois School Code] and requires

that in those situations in which the school has an action taken against one of its own constituents in which there's a constitutional challenge that the State's Attorney will, in fact, act as the attorney for the school district.

* * *

SENATOR BERMAN: I rise in opposition to this amendment. I think its important to recognize what is being attempted here. [The many school districts in Illinois] raise money from their tax revenues; they hire their own attorneys to represent them; and they retain those attorneys and make policy to move forward as [the schools] see fit. This amendment says to those school boards, you cannot use your attorneys, you have to use the State's Attorney of the county in which you reside. Ladies and Gentlemen, that doesn't make any sense to me. [First,] the resources of the entire county [are] utilized for one part of the county's legal expenditures. You're wasting the taxpayers' money that covers the rest of the county [besides] the school board. [Second,] I will tell you from experience that the attorneys who represent [and are paid by] the school boards know more about these issues than anybody on the staffs of the respective State's Attorneys. Let the school board be represented as that school board wishes. Not as we dictate. It doesn't make any sense. There may be one particular problem in Senator DeAngelis' district that he's upset with, but that doesn't mean that we have to change all of the logical and legal rules regarding school board representation. I urge a "No" vote.

* * *

SENATOR DeANGELIS: The fact of the matter is, this [amendment] would only pertain [to] those situations in which there are dual districts. [This] just doesn't apply to my district, Senator Berman. Several years ago, if you remember, we had a battle over consolidation, and it was determined that the real merit of consolidation rested in the fact that we needed to have articulation [of school students] from [Kindergarten] through twelfth [grade. Personally, I] had some concern about forcing that on school districts unless they wanted to. However, across Cook County, where the majority of the dual districts are, there are little pockets – little pockets of schools that are not allowed to – areas that are not allowed – the children are not allowed to go to the same high school as their classmates. Now, within my district, yes, there is one junior high in which 90% of the children go to one high school, the other 10% go to four. In fact, in one instance, one person had to go to a high school different, and [in] another situation, three students. So I put in a bill that permitted people from those areas [to detach and annex] in which the [equalized accessed value] was less than 10% [because I realize such a detachment could cause financial discomfort to the losing school district]. There has been absolute benign noncompliance on that because the lawyers get paid by the school districts, who want to keep the money, and the [residents] that have to fight them are property taxpayers in that district. In fact, I can tell you any district in Cook County that has this kind of a situation, [because] you will see school attorneys collecting [up to] $5,000.00 in legal fees, and the poor residents have to come up with their own defense. [The

> Legislature successfully] got the thing tightened up enough to where we had it closed off to where they would have to judge on the merits – not judge, [because] this bill doesn't require judgment, it simply says that if you meet these requirements, you can [detach and annex]. Now, all of a sudden a law firm decides to take it to the U.S. Federal Court and question this [regarding the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, based on an allegation of racial discrimination.] The whole hypocrisy of this is [shown] in the situation they have challenged, which is in my District. The three students [involved] are minority students, and [the residents] have already indicated that they're not going to win this, except for one thing. Its going to take $500,000.00 on the part of those three people to pay the legal fees of the person that's persecuting them. All that is fatiguing somebody into compliance because you have a bigger pocketbook, and that's not what America is all about.

88th General Assembly, State of Illinois, Regular Session Senate Transcript at 21-27 (121st Legislative Day, May 18, 1994). This amendment was ultimately defeated. *Id.*

In August 1995, via Public Act 89-397, § 7-2b was amended for a third time. § 7-2b then read as follows:[13]

> Annexation of a non-coterminous territory from an elementary or high school district. (a) Any contiguous portion of a high school district that constitutes 10% or less of the equalized assessed

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[13] Again, the additions to this most recent amendment of § 7-2b have been italicized and the deletions from prior versions of the law have been highlighted in bold.

value of the district shall upon petition of two-thirds of the registered voters of the territory proposed to be detached and annexed be so detached and annexed by the *State Board of Education* **Regional Board of school Trustees** if granting such petition shall make the affected segment of the boundaries of the high school district the territory is proposed to be annexed to identical, for the entirety of such affected segment, to the boundaries of the elementary school district in which the territory is located.

Any contiguous portion of an elementary school district that constitutes 10% or less of the equalized assessed value of the district shall upon petition of two-thirds of the registered voters of the territory proposed to be detached and annexed be so detached and annexed by the *State Board of Education* **Regional Board of School Trustees** if granting such petition shall make the affected segment of the boundaries of the elementary school district the territory is proposed to be annexed to identical, for the entirety of such affected segment, to the boundaries of the high school district in which the territory is located.

The *State Board of Education* **Regional Board of School Trustees** shall have no authority or discretion to hear any evidence or consider any issues except those that may be necessary to determine whether the limitations and conditions of this Section have been met.

(b) At any time prior to the granting of the petition calling for the detachment and annexation of noncoterminous territory under this Section, the Committee of Ten designated in the petition may amend

the petition to withdraw the detachment and annexation proposal and substitute in its place a proposal to require the school district from which the territory would have been detached to pay the per capita tuition costs for each pupil residing in the non-coterminous territory to attend the school district to which the territory would have been annexed. if such amended petition is granted, the school district from which the territory would have been detached shall pay to the school district to which the territory would have been annexed the per capita tuition costs as determined under Section 10-20.12a for each pupil residing in the territory who chooses to attend the school district in which the territory would have been annexed Notwithstanding the provisions of Section 10-22.5, the school district in which the territory would have been annexed shall admit any pupil that resides in the non-coterminous territory and provide such pupils with any services of the school. The payment and collection of tuition and any other such matters as may need to be resolved shall be established by an intergovernmental agreement developed between the two affected school districts.

We must note that subparagraph (b) of the most recently adopted amendment to § 7-2b instructs the Administrative Agency hearing the petition to ignore the provisions of § 10-22.5 of the Illinois School Code (Ill. Comp. Stat. ch. 105, § 5/10-22.5 (1996)), which is commonly know [sic] as the "Armstrong Act." § 10-22.5 states:

> § 10-22.5. Assignment of pupils to schools – Non-resident pupils – Tuition – Race discrimination. To assign pupils to the several schools in the district; to admit nonresident pupils when it can be done without prejudice to the rights of

> resident pupils and provide them with any services of the school including transportation; to fix the rates of tuition in accordance with Section 10-20.12a, and to collect and pay the same to the treasurer for the use of the district; *but no pupil shall be excluded from or segregated in any such school on account of his color, race, sex, or nationality*. Nothing herein shall be construed to permit or empower the State Board of Education to order, mandate or require busing or other transportation of pupils for the purpose of achieving racial balance in any school. Ill. Comp. Stat. ch. 105 § 5/10-22.5 (1996). (emphasis added).

Under any version of the statute, the Petitioners apparently only need to prove that they have the appropriate number of valid signatures on their petition, that the equalized assessed valuation of the territory to be detached is less than 10% of the EAV of the district from which the territory is to be detached, and that the resulting district boundaries were the same as the grade school district the residents were part of. We also must note that the Petition now before the Trustees was originally filed under the first amended version of § 7-2b.

III. THE HISTORY OF THE GREENS PETITION(S).

The first petition seeking detachment of the Greens from District 227 and annexation to District 233 was filed In January 1992, just four months after the Illinois General Assembly enacted § 7-2b. In June, 1992, this initial detachment petition was dismissed by the Regional Board of School Trustees because the Petitioners had failed to meet the statutory notice requirements, and therefore the

Regional Trustees did not have jurisdiction to hear the matter. Subsequently, the Illinois Legislature abolished the Cook County Regional Board of Trustees by enacting § 7-04 of the School Code (Ill. Comp. Stat. ch. 105 § 5/7-04 (1992)) effective August 28, 1992, which also provided that the Township School Trustees would now perform the functions and duties of the former Regional Board.

The Greens Petitioners refiled the petition to detach before the combined boards of the Township School Trustees in November 1992. This petition was also procedurally dismissed, this time for failure to follow the Hearing Board's rules adopted pursuant to § 7 of the Illinois School Code. In December, 1992, the Petitioners returned and filed their third detachment petition.

For the first time, the merits of the petition were brought to a hearing before the Trustees on January 19, 1993. At that hearing, District 227 raised the constitutional issues of racial discrimination and disparate racial impact for the first time. Meanwhile, in March 1993, § 7-2b was amended to clarify the confusing "coterminous" language in the original statute, and to limit the evidence to be heard by the Trustees to only the elements necessary to satisfy § 7-2b, *i.e.* the petition had the requisite number of valid signatures, the detaching territory had an EAV of less than 10%, the territory was contiguous to the annexing district, and the resulting boundaries of the annexing high school district would be identical to the grade school district involved. The plain language of the March 1993 amendment effectively eliminated the ability of a school district to present the type of evidence and argument presented at the most recent hearings before the Trustees.

In April of 1993, the Trustees announced their decision on the December 1992 Greens petition. The Thornton Trustees held to the position that an administrative agency does not have the authority to determine constitutional issues, and stated that they would not consider the constitutional issues in deciding the petition.[14] There was, however, no need to deal with any constitutional issues, for the Petitioners had failed to submit any evidence regarding the equalized assessed valuation as required by the statute. The Thornton Trustees dismissed the Petition on that basis alone.

August 1993 brought yet another round of amendments for § 7-2b. This time, the Illinois Legislature changed or clarified the contiguity requirement and modified the language regarding other elements to be satisfied. In addition, the amendment eliminated the two-year ban on refiling a detachment petition (*see* Ill. Comp. Stat. ch. 105, § 5/7-8 (1996)). This applied only to § 7-2b petitions, but not to detachment petitions filed under §§ 7-1 or 7-2.

The fourth in the series of § 7-2b detachment petitions for the Greens, which is also the Petition which is now before the Trustees, was filed with the Rich Township School Trustees on December 20, 1993. District 227 filed a petition pursuant to § 1331 of the Federal Code of Civil Procedure (28 U.S.C. § 1331) to remove the Petition to Federal Court (the United States District Court for the Northern District of Illinois) on January 25, 1994. District

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[14] This was despite the fact that the version of § 7-2b which governed the decisions regarding the December, 1992 petition, did not contain the statutory language limiting what kind of evidence could be presented to the Trustees.

227 desired to present evidence relating to the constitutional challenges regarding racial discrimination and disparate racial impact which the Trustees had expressly held could not be presented or decided upon in an administrative hearing in their written order denying the third petition. District 227 based its request for removal to federal court on § 7-2b's restrictions on presenting such evidence, and that the constitutional issues were questions of federal law. After the case was removed, Willis Brunson was added as a party plaintiff. Mr. Brunson had been the President of the District 227 School Board at the time the current petition was filed, is a resident of District 227, and is an African-American.

After over a year of litigation, the Federal District Court remanded the Petition back to the Joint Board of Trustees for hearing on February 14, 1995. Judge Elaine Bucklo of the Northern District of Illinois determined that the Federal Court could not yet have jurisdiction over the petition.[15] The petition was again filed and presented to the Rich Township Trustees on February 22, 1995.

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[15] Upon removal to the Northern District, the case was assigned to Judge Wayne Anderson. Later, the case was transferred to Judge Bucklo. Judge Bucklo raised the issue of the Federal court's jurisdiction *sua sponte*, and eventually entered the order remanding the case back to the Trustees because she determined that the Trustee, acting as an administrative agency, were not the equivalent of a state tribunal for purposes of removal. (*citing In the Matter of Petition to Detach Property: Committee of Ten v. Board of Education*, 874 F. Supp. 200 (N.D. Ill. 1995)). Because no state court had yet made a decision which effected the civil rights of the school districts or any students involved, there was arguably not yet a justiciable violation of civil rights.

The hearing on the matter began on March 27, 1995. Prior to the scheduled joint meeting, the individual Boards of School Trustees appointed their Treasurers to act as hearing officer for the proceedings involving the Petition pursuant to Ill. Comp. Stat. ch. 105, § 5/7-6(i) (1992). As the hearing on the Petition commenced, each of the individual Boards of Trustees again ratified their own resolutions appointing the hearing officers, and made the appointment of the. Treasurers a joint resolution. The Trustees were then dismissed with the Treasurers conducting the remainder of the proceedings.[16]

In May 1995, the Trustees issued their opinion and ruling upon the Petition. Once again, the Trustees emphasized that an administrative agency cannot make determinations regarding constitutional issues, and refused to allow such evidence to be presented to the joint board (it should be noted that the Thornton Trustees made an express determination to preserve these issues for Administrative Review). The Trustees, however, once again denied the Petition, this time for failing to meet the requirements of the burden of proof as to how many registered voters resided in the Greens, and for failing to properly lay an evidentiary foundation for the validity of several key exhibits.

Meanwhile, in August 1995, the Illinois Legislature again amended § 7-2b, so that it was now in its present form. The main feature of this last amendment gave the

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[16] This order has continued to govern the conduct of the hearings held before the joint board of Township Trustees at the mandate of the Circuit Court of Cook County.

State Board of Education jurisdiction over § 7-2b petitions, instead of the Township Trustees. A new and unprecedented section was also added to the law, allowing for the voluntary withdrawal of a § 7-2b petition with the subsequent ability of students living in the area to be detached to attend school in the annexing district, with the detaching district footing the tuition bill. It is this section of the bill that expressly disclaims the need to comply with the *Armstrong* Act.

On the heels of this latest amendment, the Petitioners submitted a timely motion for rehearing under Ill. Comp. Stat. ch. 105, § 7-6(n) (1992). Along with this motion, Petitioners included evidence to supplement the record and correct the evidentiary shortcomings the Thornton Trustees found in the initial presentation of the petition. On August 29, 1995, after examining this evidence, the Trustees reversed their decision to deny the Petition.

School District 227 subsequently filed a timely complaint for administrative review in the Circuit Court of Cook County. In the course of that litigation, the Court affirmed the Trustees' findings regarding § 7-2b's technical and procedural requirements for the Petition. *Bd of Educ. of Rich Township High School Dist, et al. v. Brown,* No 95 CH 9540 (Circuit Court of cook County, IL), Order of Court dated Nov. 15, 1996 (*i.e.*, the Petition had the requisite number of valid signatures of registered voters within the Greens, the area was contiguous, the EAV was less than 10%, and the resulting boundaries complied with the statutory requirements). The Court remanded the case (*Id*, Order of Court dated Sept. 27, 1996), however, for a hearing on the constitutional issues which the Trustees have steadfastly determined they could not deal

with throughout the history of this Petition. Evidentiary hearings were conducted in the summer of 1997, and this Opinion is the result of those proceedings.

IV. THE STATISTICAL EVIDENCE FOR THE GREENS PETITION.

A great deal of historical and statistical evidence was submitted regarding the two school districts involved and for the area of the Greens. Both parties have introduced evidence regarding the racial makeup of the schools and the Greens at the time the Petition was originally filed in late 1993 and early 1994, as well as the same information updated for 1997. District 227 has also produced a sizable amount of information on the evolution of its own racial statistics since as long ago as 1986.

The information submitted regarding the racial balance of the schools and the Greens prior to 1996-97 is relevant only insofar as it reveals historic trends. Even as residents and businessmen who live and work in the south suburbs of Chicago where the Greens are located, we can readily agree that the racial makeup of the south suburbs is changing from an area primarily populated by Whites to an area which is effectively integrated or primarily African American. This is particularly true of Olympia Fields; it is true to a lesser degree of Homewood and Flossmoor[17] The evidence submitted by the Objectors

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[17] *See* Notes 38-39 and 51 and accompanying text for the Testimony of urban sociologist and expert witness Dr. David Hartmann regarding trends in the area's racial demographics.

shows this in excruciating detail; and it is only relevant to show the roots of the current racial makeup of the area.

The truly relevant information regarding the racial makeup of the area shows the current statistics regarding the racial makeup of the schools and the Greens. The Petition, if granted, could only take effect now or in the future. In this same vein, we must pay attention to the evidence submitted regarding future high school students in the Greens (i.e., grade school and preschool children currently residing in the Greens), for allowing the Petition may affect the racial makeup of the schools in future years in light of the historical trends noted. Finally, we must take into consideration the racial makeup of all residents of the Greens, even senior citizen "empty nester" types and those who do not have children. This is because these residents were also signatories or potential signatories to the Petition, while the children themselves cannot legally sign the Petition.

Rich Central High School, the school and attendance center within District 227 which will be affected by the Petition, has a total of 1,024 students, of which 16.6% are Caucasian, 79.5% are African-American, 1.6% are Hispanic and 2.3% are Asian/Pacific Islander. (Obj. Ex. No. 31).[18] In contrast, Homewood-Flossmoor High School in District 233 has a total enrollment of 2,249 students. 70.8% of those students are Caucasian, 22.9% are African-American, 2.5% are Hispanic, 3.4% are Asian/Pacific Islander and .3% are Native American. (Obj. Ex. No. 3).

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[18] The exhibits will be cited as either objector's exhibits (Obj. Exh.), Petitioners' exhibits (Pet. Exh.) joint stipulations (Jt. Stip.).

The evidence tended to show that both schools offer programs of extremely high educational quality and similar educational opportunities and levels of student tracking. (May 19, 1997 A.M. Tr. p. 206).[19] Indeed, even the Petitioners who testified by and large expressed no preference for one school over the other.[20] District 227 presented both district's report cards, and emphasized many fine programs at both schools. The Petitioners, however, presented absolutely no demographic evidence on the superiority of District 233, and appeared to agree that the two schools were actually much the same for practical purposes.[21]

The parties stipulated to the following evidence regarding the racial makeup of the population in the Greens: As of April 1997, The Greens had a total of 213 residents. (Jt. Stip. 17). Of those residents, 146 (69%) are Caucasian, 60 (28%) are African-American and seven (3%) are Asian. As of April 1997, a total of 55 children resided in The Greens. (Jt. Stip. 17). Of those 55 children, 16 are preschool age, 33 are in grades kindergarten through 12

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[19] The transcripts of the hearings will be cited in this format, listing the date of the hearing, whether it was the morning or afternoon session, "Tr" for "Transcript," and the page number.

[20] *See* Section VII, *infra*.

[21] Thus, the Petition would have ostensibly failed under the standards of §§ 7-1 & 1-2 of the Illinois School Code, *i.e.* best interests of the pupils in the entire area and the districts affected; the "benefit/detriment analysis;" the proof of "no serious harm to the educational resources of either district;" and the "whole child" or "community interest" tests. *Board of Education of Golf School District No. 67 v. Regional Board of School Trustees of Cook County*, 89 Ill. 2d 392, 433 N.E.2d 240 (1982).

and six are college age. (Jt. Stip. 17). Of those 16 preschool aged children, 11 are Caucasian and five are African-American. (Jt. Stip. 17). Of those children in grades kindergarten through 12, 18 are Caucasian, 12 are African-American and three are Asian. (it. [sic] Stip. 17). Of the four high school aged children, one is Caucasian and three are African-American. (Jt. Stip. 17). of the six college-age children, two are Caucasian and four are African-American. (Jt. Stip. 17, 20, Obj. Ex. No. 7).

V. THE HISTORY OF § 7-2b IN OTHER SCHOOL DISTRICTS.

District 227 presented evidence regarding the history of § 7-2b in other school districts and other municipalities. The following is a summary of the statistics and demographics of the school districts involved and areas which sought detachment. District 227 has supplied a chart as an exhibit, showing a time line which places the history of § 7-2b and it amendments, the history of the Greens Petition, and the history of each of the following petitions into a cohesive perspective. Obj. Exh. 36.

A. Homewood Acres

Prior to the enactment of § 7-2b, in October 1990, residents living in an area known as Homewood Acres, a residential development located within Bremen Township High School District 228, Cook County, Illinois ("District 228") filed a petition to detach a residential area commonly known as "Homewood Acres" from District 228

and annex it to Homewood-Flossmoor High School District 233. Hillcrest High School, the attendance center within School District 228 from which the petitioners were seeking to detach, has a total enrollment of 1,335 students. (Obj. Ex. No. 42). Of those 1,335 students, 5.5% are Caucasian, 92% are African-American, 1.4% are Hispanic, .9% are Asian/Pacific Islander and .2% are Native American. (Obj. Ex. No. 42). The total enrollment at Homewood-Flossmoor High School District 233 is 2,249 students. (Obj. Ex. No. 3). 70.8% of those students are Caucasian, 22.9% are African-American, 2.5% are Hispanic, 3.4% are Asian/Pacific Islander and .3% are Native American. (Obj. Ex. No. 3).

Prior to the filing of the Homewood Acres petition, the South Cook County Committee for School District Reorganization submitted a plan to the Superintendent of the State Board of Education recommending the detachment of Homewood Acres from School District 228 and annexation to Homewood-Flossmoor High School District 233. (Obj. Ex. No. 37). The Superintendent of the State Board of Education rejected this proposal. *Id.* One of several reasons cited for rejecting the Petition was the proposed detachment would have a disparate racial impact on the community and would cause a racial imbalance between the two school districts and among the attendance centers within District 227. *Id.* Ultimately, the State Board of Education found that while the petition for detachment met all the requirements of the *Illinois School Code,* the proposed detachment would be a significant detriment to the schools in the area and the educational welfare of the pupils therein; and, that the detachment would have an incremental segregative

impact upon the affected school districts. Moreover, the State Board of Education found that the detachment would negatively impact upon the social development of the children in each of the affected school districts. *Id.*

We note that the Homewood Acres case is only relevant as a history lesson. The Petition in that case was not brought under § 7-2b. However, it does involve similar facts. Hillcrest High School, which serves Homewood Acres, and Rich Central High School, which serves the Greens, both have student populations which are over 80% African American. The two areas seeking detachment both have populations which are at least approximately 70% White. Both petitions sought to detach neighborhoods which are essentially and primarily Caucasian from schools with student populations which are essentially and primarily African-American to annex to the same school district which has a student population which is approximately 70% Caucasian. We also note that both Homewood Acres and the Greens lie within the legislative district from which Senator Aldo De Angelis, the sponsor of § 7-2b, was elected.

B. Cherry Hills/Joliet Township

In April 1992, petitioners from the Cherry Hills residential development, located within Joliet Township High School District 204, Will County, ("District 204") filed a § 7-2b petition to detach Cherry Hills from District 204 and annex it to Lincoln-Way High School District 210, Will County, Illinois. In October 1992, the Regional Trustees denied the Cherry Hills petition because the

petitioners failed to prove § 7-2b's "contiguous" requirement. The Cherry Hills petitioners returned and filed a new petition to detach in April, 1993. In February 1994, the Cherry Hills petition was ultimately granted. Like the current case, District 204 attempted to raise the issues of unconstitutional racial bias and violation of the equal protection clause and civil rights statutes, but the Illinois Courts refused to allow such evidence to be considered because the issue had not been properly presented to the administrative agency, and thus was not preserved for administrative review. *See Rogers v. Desiderio*, 274 Ill. App. 3d 446, 655 N.E.2d 930 (3d Dist. 1995).

The total enrollment at Joliet Township School District 204 is 4,482 students. (Obj. Ex. No. 40) .47% of those students are Caucasian, 32.3% are African-American, 18.1% are Hispanic, 2. 1% are Asian/Pacific Islander and .6% are Native American. *Id.* Lincoln-Way High School District 210, the annexing district in the Cherry Hills petition, has a total enrollment of 3,187 students. (Obj. Ex. No. 39). Of those 3,187 students, 96.7% are white, .4 % are African-American, 1.7% are Hispanic, 1% are Asian/ Pacific Islander, and .2% are Native American. *Id.*

C. Bradley Terrace/Bloom Township

In September 1992, petitioners from the Bradley Terrace residential development, located in Bloom Township High School District 206, Cook County, Illinois ("District 206") filed a § 7-2b petition to detach from School District 206 and annex Bradley Terrace to Homewood-Flossmoor High School District 233. The Bradley Terrace petition was subsequently withdrawn by the petitioners. Bloom

High School, the attendance center from which the petitioners from Bradley Terrace were seeking to detach, has a total enrollment of 1,529 students. (Obj. Ex. No. 44). 30.2% of those students are white, 45.3% are African-American, 23.8% are Hispanic, .2% are Asian/Pacific Islander and .5% are Native American. *Id.* Bradley Terrace is also a part of Senator DeAngelis' senate district.

D. Thornton Township/Thornwood/T.F. South

In June 1993, petitioners from a residential development located in Lansing, Illinois within Thornton Township School District 205, Cook County, Illinois ("District 205") filed a petition to detach from School District 205 and annex the development to Thornton Fractional South High School District 215, Cook County, Illinois ("District 215"). In September 1993, the Lansing petition was denied, but later reversed on administrative review. *Ambrose v. Thornton Township School Trustees*, 274 Ill. App. 3d 676, 654 N.E.2d 545 (1st Dist. 1995). As was the case in the Cherry Hills petition, the presentation of the constitutional issues proved futile because District 205 failed to preserve the issue on for review, this time by failing to present the issues to the Circuit Court on Administrative Review.

District 205, the district from which the Lansing petitioners sought detachment, has a total enrollment of 7,069 students. (Obj. Ex. No. 45). Of those 7,069 students, 13.3% are white, 82.6% are African-American, 3.5% are Hispanic and .5% are Asian/Pacific Islander. *Id.* Thornton Fractional South High School in District 215, the school to which the Lansing petitioners sought annexation, has a

total enrollment of 1,503 students. (Obj. Ex. No. 41). 77.6% of those students are white, 14.7% are African-American, 5.8% are Hispanic, 1.1% are Asian/Pacific Islander and .8% are Native American. *Id.* The areas involved in the Lansing Petition (particularly Thornwood High School, the District 205 attendance center involved) are also within Senator DeAngelis' senate district.

E. Proviso Township

District 227 also presented evidence regarding a detachment petition filed in March 1992, seeking to detach an area from Proviso Township High School District 209, Cook County, Illinois, and annex it to Riverside/Brookfield High School District 208, in Cook County, Illinois. *Jackson v. Cook County Board of School Trustees*, 282 Ill. App.3d 191, 667 N.E.2d 1335 (1st Dist. 1996), affirmed the Regional Board of School Trustees' denial of the petition for detachment. Proviso East High School, the high school within Proviso Township High School District 209 from which the petitioners were seeking to detach, has a total enrollment of 2,030 students. (Obj. Ex. No. 49). 3.9% of those students are Caucasian, 85% are African-American, 9.9% are Hispanic and 1.2% are Asian/Pacific Islander. *Id.* Riverside-Brookfield School District 208, the district into which the petitioners were seeking to annex, has a total enrollment of 925 students. (Obj. Ex. No. 48). 89.1% of those students are Caucasian, .8% are African-American, 8.8% are Hispanic and 1.4% are Asian/Pacific Islander. (Obj. Ex. No. 48). We must note that, like Homewood Acres, the Proviso Township petition was not brought under § 7-2b, and, unlike all the other petitions

cited by District 227, is in a different geographical area. The only similarity is in the demographics of the student bodies of the two high schools involved.

VI. JURISDICTION, STANDING, AND THRESHOLD CONSTITUTIONALITY ISSUES.

A. District 227's Objection to the Trustees' Jurisdiction over the Petition.

From the outset of the current round of hearings on the Green's Petition, District 227 has raised the objection that the Trustees do not have jurisdiction over the current petition. The Objector bases this under the most recent amendment to § 7-2b, which gives jurisdiction over § 7-2b petitions to the State Board of Education, rather than the Township Trustees.[22] District 227 raised this issue as the hearings on the constitutional issues commenced, and has dutifully continued to remind the Trustees that it will not waive this objection as these proceedings continue.

Generally, amendments to statutes cannot be applied retroactively where such an application would impair established or vested rights and expectations. *See First of America Bank Rockford v. Netsch,* 166 Ill. 2d 165, 651 N.E.2d 1105 (1995). Here, the Greens Petitioners had filed a petition under § 7-2b as it existed in December, 1993. To change the procedural rules and the agency which hears

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[22] *See* Note 13, supra, and accompanying text. The Township Trustees have jurisdiction pursuant to Ill. Comp. Stat. ch. 105, § 5/7-04 (1996), even though the former versions of § 7-2b gave jurisdiction to the Regional Board of Trustees, because § 7-04 abolished the Cook County Regional Board of Trustees.

the evidence at this point would be violative of the principles articulated in cases such as *First of America Bank*. District 227, however, argues that the latest amendment to § 7-2b had an express effective date of August 20, 1995, and that all proceedings brought under that statute after that date must comport with the amendment.

This fails to take into account § 2-3.105a of the School Code. The Illinois General Assembly evidently had the question of the amended version of § 7-2b's retroactive application to pending petitions in mind, because § 2-3.105a states that the State Board of Education shall perform the duties previously performed by the Trustees under § 7-2b "with respect to all petitions filed under that section **AFTER** the effective date of this amendatory act." Ill. Comp. Stat. ch. 105, § 5/2-3.105a (1996) (emphasis added). Because the Petition currently before the Trustees was filed before the effective date of the latest amendment, this "savings clause" effectively renders any question of retroactive application of the amendment moot. The legislature clearly intended for the Trustees to keep jurisdiction over all petitions pending at the time of the amendment.[23]

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[23] District 227 attempted to raise this issue on an emergency motion before the Circuit Court, which retained jurisdiction over this case when it remanded it back to the Trustees. The Court agreed with the Trustees' position. See Order of Court dated April 18, 1997, *Bd of Educ. of Rich Township High School Dist. 227 v. Bloom Township Trustees of Schools*, No. 97 CH 4630.

B. District 227's Standing to Bring an Equal Protection Claim.

A potential issue, raised *sua sponte* by the Trustees prior to the closing arguments, is whether District 227 has standing under the Equal Protection Clause of the Fourteenth Amendment. Generally, a school district, school board, and its superintendent acting in his official capacity has no standing to question the validity of legislation on constitutional grounds. Boards of education and school districts are governmental agencies created by the legislature and subject to its will. *People ex rel. Taylor v. Camargo Community Consolidated School District No. 158,* 313 Ill. 321-27 (1924); *Trustees of Schools v. Tatman,* 13 Ill. 27 (1851). Constitutional protections, such as due process and equal protection guarantees, in the ordinary sense, do not extend to school districts or school boards. *People ex rel. Dixon v. Community Unit School District No. 3,* 2 Ill. 2d 454, 466 (1954); *People v. Deatherage,* 401 Ill. 25, 32 (1948). In particular, school districts and school boards do not have standing to protest alleged racial discrimination, since they are not a member of the protected class of pupils. *Board of Education v. Bakalis,* 54 Ill. 2d 448, 299 N.E.2d 737 (1973).

Despite this general prohibition against School Districts asserting the constitutional rights of their students for them, we believe District 227 has established that there is standing to bring the Equal Protection claim. First, when the Petition was removed to Federal Court, Willis Brunson, then the President of the School Board for District 227, was named as a party plaintiff in his individual capacity, and not just as a member of the school

board. The plaintiffs in the federal proceedings brought allegations on Mr. Brunson's behalf as a taxpayer and resident of District 227, including allegations of the injurious effects the petition and § 7-2b had upon him. *See Hamer v. Board of Education*, 47 Ill. 2d 480, 483 (1970). This has continued with the Administrative Review, where the complaint has named Mr. Brunson as a plaintiff in his official and individual capacity and brought allegations of injury to him. Therefore, because Mr. Brunson is an individual party plaintiff who resides in District 227 and is an African American, there is standing to bring the Equal Protection claims.

But even if Mr. Brunson were not a party to this action, the Trustees believe that District 227 has standing to bring the Equal Protection claim, based on *Brewer v. Hoxie School District No. 46*, 238 F. 2d 91 (8th Cir. 1956). In *Brewer*, a local School Board in Arkansas decided it was obligated to implement the desegregation mandate handed down by the U.S. Supreme Court in *Brown v. Bd of Education*, 347 U.S. 483 (1954). Several groups of private citizens began to actively seek to interfere with and thwart the school district's desegregation plans. The district brought suit to enjoin this activity. One of the citizens' defenses was that the school district did not have standing to raise the constitutional claims of the minority students, based on similar principles to those found in the *Bakalis* case and the other precedent cited *supra*.

The 8th Circuit Court of Appeals determined that the district had standing to raise the equal protection claim. The court noted that it had the power to afford any remedy necessary to vindicate federal substantive rights

defined in constitutional provisions except where the legislature has explicitly indicated that such a remedy is not available. *Brewer*, 238 F.2d at 95. The School Board was bound by a constitutional duty and oath to uphold the constitution, which included a duty to ensure that its students were afforded equal protection under the laws. *Id.* The Court determined that the Board had a right to enforce that duty, and to enforce it free form the interference of private citizens or other government bodies. *Id.* Indeed, this was true, despite the fact that the citizens were themselves alleging affirmative defenses founded in constitutionally protected rights of freedom of speech, expression, and assembly. *Id.* The Court ultimately determined that because the school district had a duty to operate a desegregated school district, it had the innate ability to secure equal protection of the laws to all persons within that school district, and held that the district had standing to bring the Equal Protection claim. *Id.* at 96.[24]

While the actions of the citizens in this case are certainly not as extreme as those in *Brewer*, the same principles apply. The District 227 School Board has a duty, sworn by oath, to uphold the Constitution, which includes a duty to help ensure that the students of the District and the citizens that live within it are afforded

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[24] This case was never appealed to the U.S. Supreme Court, and is still established law. It was relied upon by Justice Brennan in his concurring opinion in *U.S. v. Guest*, 383 U.9. 745 (1966), which was an important case in shaping a body of law which prevents private citizens from interfering with the constitutional rights of African-Americans to equal protection under the law.

equal protection of the laws in the areas over which the Board has jurisdiction and control. Under the principles of *Brown v. Bd. of Education,* 347 U.S. 483 (1954) and its extensive progeny, this duty includes an effort to effectively manage the racial makeup of the schools within the District. This duty necessarily gives District 227 a correlative right to Exercise the duty free from the interference of private citizens and other government bodies. This is true, even if the purported "interference" comes in the form of a legislatively sanctioned petition, rather than with civil unrest (as was the case in *Brewer*), or if the citizens have other legitimate defenses which may have non-discriminatory overtones.[25] Under *Brewer,* a school board's or district's usual inability to raise a constitutional claim is subverted to the greater duty of the board or district to protect its minority students and residents from forces beyond its jurisdiction which seek to interfere with the constitutional rights of those students or residents.

More recently, the Federal District Court for the Eastern District of Wisconsin came to a similar conclusion. In *Bd. of School Directors v. Wisconsin,* 649 F. Supp. 82 (E.D. Wis. 1985), the Court held that the School Board for the City of Milwaukee had standing to bring an Equal Protection claim against school districts in the Milwaukee suburbs based on the these districts' alleged interference with the Milwaukee School Board's plans to desegregate the public schools within the City of Milwaukee.[26] The

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[25] *See* discussion is [sic] Sections VI and VII, *infra.*

[26] The Petitioners could argue that the Milwaukee case is distinguishable from *Brewer* and the case before us because the

Bd. of School Directors Court noted that local school boards can have standing to sue other state agencies under the auspices of the Constitution's supremacy clause. The Court held that the most logical and appropriate party to bring an action for government agencies which contravene the Constitution via official action, regulation, or legislation is the party who has been adversely affected. *Id.*, at 97. Under the *Bd. of School Directors* case, the Court expressly determined that the adversely affected party was the School District itself.

Also, § 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983), the civil enforcement tool for the Fourteenth Amendment (*see Collins v. Hardyman*, 341 U.S. 651 (1951)), provides a cause of action for private persons for the deprivation of rights secured under the Constitution and federal law under the color of state law. Federal Courts have repeatedly held that school boards and school districts are "persons" within the meaning of § 1983. *See, e.g., Strong v. Demopolis City Bd. of Educ.*, 515 F. Supp. 730 (S. D. Ala. 1981) (and cases cited therein).

Finally, District 227 argues that many of these same issues were already litigated before Judge Wayne Anderson while the Petition had been removed to Federal Court. While not proclaimed in a published opinion, and

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suit involved one school district suing other government agencies, including other school districts, and not individuals. This distinction has little bearing on the analysis; however, even if it did, certain of the Defendants in *Bd. of School Directors* were sued in their individual capacity. Also, on administrative review, each of the Boards of Township School Trustees, all government agencies with a legal status similar to a public school district, were named as party defendants.

therefore not necessarily binding upon the Trustees, Judge Anderson did state from the bench while ruling on a motion made by the Petitioners for Judgment on the Pleadings that he felt that District 227, had standing to bring the Equal Protection claim. *Committee of 10 v. Bd. of Educ. of District 227*, 94 C. 446 (N.D. Ill.), Transcript of Proceedings, Oct. 27, 1994, p. 14.[27] The Northern District of Illinois, in a ruling which ultimately remanded the Petition back to the Trustees and Illinois state jurisdiction, *sua sponte* raised the issue of whether the federal jurisdiction issue was "ripe" or not.[28] Had standing been an issue which needed to be reckoned with, we believe the Federal Court would have raised the issue as well.[29] Therefore, regardless of the status of any private citizen or student as a plaintiff in this action, we firmly believe that District 227 has standing to bring the Equal Protection claim.

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[27] Judge Anderson's ruling was also based on the fact that there was an individual plaintiff in the case as well. *Committee of 10 v. Bd. of Educ. of District 227*, 94 C. 446 (N.D. Ill.), Transcript of Proceedings, Oct. 27, 1994, p. 14.

[28] *See* Note 15, *supra*.

[29] Although we should note that if the Federal District Court held it did not have jurisdiction over the case, it makes it difficult for District 227 to argue that somehow comments made by a judge from the bench in a preliminary hearing can be elevated to be "law of the case." The Federal Court made no actual substantive ruling on any of the matters presented to it except for the issue of Federal jurisdiction.

C. Prior Illinois Cases Recognizing the Constitutionality of § 7-2b

Petitioners argue that because § 7-2b is a duly and properly enacted statute by the state legislature, we must presume it is constitutional. Further, they claim that because published Illinois decisions[30] have upheld the statute's constitutionality, then we must do likewise. Petitioners' Post-Hearing Brief at 2. In particular, Petitioners cite to *Rogers v. Desiderio*, 274 Ill. App. 3d 446, 655 N.E.2d 930 (3d Dist. 1995)[31], where the Appellate Court upheld a constitutional challenge to § 7-2b as an impermissible delegation of legislative power.

We agree with Petitioners that we must usually be deferential to the actions of the General Assembly, and accept statutes as constitutional. But aggrieved parties must be able to challenge the constitutionality of allegedly improper legislation within the proper forum and under the proper procedural rules. While Illinois courts have treated § 7-2b as valid, no court has ever addressed the statute's validity under an Equal Protection challenge. This is an issue of first impression, and

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[30] These include *Rogers v. Desiderio*, 58 F. 3d 299 (7th Cir. 1995); *Jackson v. Cook County Regional Board of School Trustees*, 282 Ill. App. 3d 191, 667 N.E.2d 1335 (1st Dist. 1996.; *Rogers v. Desiderio*, 274 Ill. App. 3d 446, 655 N.E.2d 930 (3d Dist. 1995); *Ambrose v. Thornton Township Trustees of Schools*, 274 Ill. App. 3d 676, 665 N.E.2d 1335 (1st Dist. 1995).

[31] *Rogers* involved the Cherry Hills Petition, discussed in Section V B, *supra*.

therefore the published case precedent upon which Petitioners seek to have us rely has no application in the arguments now before us.

VII. THE TESTIMONY PRESENTED BY THE PARTIES.

The parties presented several groups of witnesses. District 227 called several of the members of the Committee of 10[32] as well as other Petitioners as adverse witnesses, presented several expert witnesses and Mr. Willis Brunson, the individual named as Plaintiff on administrative review, and called educational officials and employees from District 227, District 233, and other school districts that have experienced § 7-2b petitions. The Petitioners presented the testimony of individuals who had signed the Petition (including several Petitioners who had already testified as adverse witnesses), as well as at least one resident of the Greens who was not a signatory to the Petition but supports the Petition.

We will summarize the testimony of the witnesses. The summary of the testimony of individual Petitioners will necessarily merge evidence presented if that particular Petitioner testified both in District 227's case and on the Petitioners' behalf. The summary of the testimony of the educators may also be merged where certain statements were common to several of the districts involved.

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[32] § 7-6(c) of the Illinois School Code provides that any detachment petition with more than 10 signatures shall designate a Committee of 10 of the signatories to act as spokespersons for the Petitioners. Ill. Comp. Stat. ch. 105, § 5/7-6(c) (1996).

A. The Petitioners' Testimony

The only reason stated by each of the Petitioners who testified for seeking detachment from District 227 and annexation to District 233 was a desire to see the children residing in the Greens to attend high school with the peers they met in grade school.[33] The Greens is part of Grade School District 161, which primarily serves the Village of Flossmoor. Graduates of District 161 attend one of four high schools: Bremen High School District 228, Cook County, Illinois; Bloom High School District 206, Cook County, Illinois; District 227; and District 233. Currently, students attending high school from the Greens must attend District 227. If the Petition is granted, high school students residing in the Greens would instead attend District 233. The direct testimony of the Petitioners indicates that this is apparently all they desire. The following is a summary of each person's testimony who appeared and testified on behalf of the Petitioners:

Ms. Karla Inwood testified as a Petitioner. Both of her children had graduated high school before she signed the petition (May 19, 1997 A.M. Tr. pp. 31-32); thus, she has no children who will be affected by the petition. She testified that the reason she signed the petition is because she believes children should stay with their peers from grade school through high school. (May 19, 1997 A.M. Tr. p. 33). She also testified that her children had attended

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[33] There were hints by some of the Petitioners who testified that they felt the curricular offerings and extra curricular activities in District 233 were superior to Rich Central High School. *See, e.g.*, Summary of the testimony of Roy Schweinfurth and Terrence Brown, *infra*.

Catholic school, except for her second child, who did attend high school in District 227. She claimed that enrolling her son in public school "was a mistake" and that she had a bad experience with District 227 schools. She expressed a dislike for "the people he went to school with" and said her son fell in with a "wrong group." (May 19, 1997 A.M. Tr. pp. 41-44).

Ms. Donna Vander Luitgaren testified as a Petitioner. She has five children, four of whom are still at home. (May 19, 1997 A.M. Tr. p. 45). District 227 draws our attention to Ms. Vander Luitgaren's historic and intentional practice of having her children attend a high school with students different from their grade school peers. Her first two children attended Catholic elementary schools, as well as Catholic High Schools. Specifically, her second born attended three different local schools: St. Lawrence O'Toole, a Catholic school for grades kindergarten through six; Huth Middle School, a public school for grades seven and eight[34]; and Marian Catholic High School, a parochial school in Chicago Heights, Illinois. (May 19, 1997 A.M. Tr. p. 46). Her third child attended four different schools: St. Lawrence O'Toole for grades kindergarten and first; Huth for grades two through seven; Parker Junior High School, a public school located in Elementary School District 161 for grade eight; and Marian Catholic High School. (May 19, 1997 A.M. Tr. p. 46). Her fourth child attended Arcadia School, a public school in a district other than District 161, for early grades; then the child attended Western Avenue School

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[34] Huth Middle School exclusively feeds its elementary school graduates into High School District 227.

and Parker Junior High School in District 161; and is now enrolled at Marian Catholic High School. (May 19, 1997 A.M. Tr. p. 47). Her youngest child is currently a seventh grader at Parker Junior High School in District 161. Ms. Vander Luitgaren testified that, even if the petition is granted, her youngest child will attend Marian Catholic High School. (May 19, 1997 A.M. Tr. p. 47).

Mr. Keith Cox testified as a Petitioner. His children are all adults and will not be affected by this petition. (May 19, 1997 A.M. Tr. p. 49).[35] He expressed that he had no concern for the affect [sic] of the Petition on his property-values, and that the reason he signed the petition was he felt it was better for the children to go to high school with their peers. (May 19, 1997 A.M. Tr. p. 84) It was not until the petition was circulated, several years after his children graduated, that he formed the opinion that children should stay with their peers. throughout school. (May 19, 1997 A.M. Tr. p. 65).

A good portion of the questions asked of Mr. Cox centered around statements he made to a local newspaper, the Southtown Economist, when a reporter questioned him about the Petition. The newspaper article quoted him as saying, "I do know that when we were in

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[35] District 227 also draws our attention to how Mr. Cox's children did not attend high school with their grade school peers. Mr. Cox apparently separated his children several times from their friends during their educational careers. He had five children, one attended four different public school districts; the others attended two different public school districts. (May 19, 1997 A.M. Tr. p. 50).

the process of looking at the Greens, the very high proportion of black children (at Rich Central High School) was causing a problem with declining property values." (Obj. Ex. No. 6, Art. 1). Mr. Cox did not deny making the statement, but inferred that his statement was taken out of context. He was adamant that he had told the reporter about his desire to see the children attend high school with their peers. (May 19, 1997 A.M. Tr. p. 67). He stated that his concern regarding property values had its genesis when he sold his home in Flossmoor before moving to the Greens. At that time, certain Realtors had discussed a disparity in value between Flossmoor and Olympia Fields; in particular, there was a concern that comparable homes in Olympia Fields were worth less than homes in Flossmoor. When asked if the brokers had ever articulated a reason for this disparity in value, Mr. Cox claimed he could not remember. (May 19, 1997 A.M. Tr. p. 76).

Ms. Mary Ellen McKeowen testified as a Petitioner. She testified that she signed the Petition in support of the "peer togetherness" issue. (May 19, 1997 A.M. Tr. p. 93). Like the previous Petitioner witnesses, District 227 argues that Ms. McKeowen's family history reveals an intent to separate her children from their grade school peers when they reach high school. She has four children, only one of which is still in school and will be affected by this petition. (May 19, 1997 A.M. Tr. p. 87). Her second oldest child was moved from Louisville, Kentucky after her junior year of high school arid completed her senior year at Marian Catholic High School. (May 19, 1997 A.M. Tr. p. 88). Her third child attended Parker Junior High School in District 161 and then Marian Catholic High School. (May 19, 1997 A.M. Tr. pp. 88-89). Her youngest child

attended Western Avenue School, a public school, for kindergarten and then matriculated at Infant Jesus of Prague for grades one through seven, which is where he is today. (May 19, 1997 A.M. Tr. pp. 89-90). Ms. McKeowen believes her youngest child will attend Marian Catholic High School even if the petition is granted. (May 19, 1997 A.M. Tr. p. 91). Ms. McKeowen also testified that her third born's friends from Parker Junior High School attended Homewood Flossmoor High School while her child went to Marian Catholic High School, but he is still friends with them. (May 19, 1997 A.M. Tr. p. 94). Despite the friendships, however, even if Homewood-Flossmoor High School were an option, she would have tried to talk her son out of attending Homewood-Flossmoor in favor of attending Marian Catholic High School. (May 19, 1997 A.M. Tr. p. 96). Indeed, she expressly stated that she would have sent her children entirely to Catholic elementary school, but that for some of them there was no room in the local Catholic Grade School. (May 19, 1997 A.M. Tr. p. 90). Ms. McKeowen ended here [sic] testimony by explaining that as a practicing Catholic, she preferred the "moral atmosphere" of parochial schools. (May 19, 1997 A.M. Tr. p. 96).

Ms. Karen Cooke testified as a Petitioner. She has four children, only two of whom are school-age. (May 19, 1997 A.M. Tr. pp. 97-98). Ms. Cooke stated that she was not concerned about the high school district where her home was located when she purchased, because her children were too young at the time. When she discovered that her children would attend Rich Central High School, she was "upset and disappointed." She believed the children should be "kept together" when they attend high

school. (May 19, 1997 A.M. Tr. p. 99). Ms. Cooke specifically stated that she wants her children to attend Homewood-Flossmoor High School, but admitted that she knows nothing about the programs at either Homewood-Flossmoor High School or Rich Central High School. (May 19, 1997 A.M. Tr. p. 101).

Mr. Terrence Brown testified as a Petitioner. Mr. Brown has one school-aged child who is presently enrolled in Flossmoor School District 161. (May 19, 1997 A.M. Tr. pp. 146-149). Mr. Brown testified that he has not yet decided where his son will attend high school even if the petition is granted. (May 19, 1997 A.M. Tr. p. 156), but one of the factors that will decide where his son goes to high school is the availability of the best education. (May 19, 1997 A.M. Tr. p. 158). Indeed, Mr. Brown at one time articulated that his reason for signing the Petition had more to do with the quality of education than the issue of "peer togetherness." He thought that Districts 233 and 161 has a unified curriculum, meaning it would be better for the grade school students in District 161 to attend District 233 rather than District 227. (May 19, 1997 A.M. Tr. pp. 153-54). However, Mr. Brown admitted that he had never seen a copy of District 161's curriculum; nor did he know if a unified curriculum between the grade school and high school actually existed. (May 19, 1997 A.M. Tr. pp. 154-56). When asked which of the two high schools he thought was "better," Mr. Brown replied that he believes that Rich Central High School and Homewood-Flossmoor High School are "equally good schools." (May 19, 1997 A.M. Tr. 164). Later, Mr. Brown testified that his reason for signing the Petition was that he personally believed in a "community of interest" with District 233, and not

District 227, and that his kindergarten-aged son "wants to go to Homewood-Flossmoor High School." (June 9, 1997 A.M. Tr. p. 53).

Mr. Bruce Peterson testified as a Petitioner. He has no school-aged children who will be affected by this petition. (May 19, 1997 A.M. Tr. p. 9). Moreover; when he signed the petition, Mr. Peterson was not even aware that the grade school attended by children from The Greens divides its students among more than one high school (May 19, 1997 A.M. Tr. pp. 10-11). He merely wanted his children to attend Homewood-Flossmoor High School. (May 19, 1997 A. M. Tr. p. 11), and testified that his children merely "wanted to go to [high] school with their friends." (May 19, 1997 A.M. Tr. ¶ 20).[36] Mr. Peterson ostensibly claims that he was the originator of the Petition, stating that he discovered the provisions of § 7-2b and began the petition process. (May 19, 1997 A.M. Tr. pp. 22-24). He admits to having a relationship with the sponsor of the legislation, Senator Aldo De Angelis, but does not recall discussing the Petition with him. (May 19, 1997 A.M. Tr. p. 24) He stated that he had "no opinion" as to the effect the Petition would have on his real estate values (May 19, 1997 A.M. Tr. p. 26), and claimed that he was unaware that Rich Central High School was a predominately African-American School. (May 19, 1997 A.M. Tr. p. 28-29).

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[36] District 227 points out that despite Mr. Peterson's claim that he was motivated to sign the Petition out of a desire to see the "peer togetherness" issue realized, he testified that he switched his youngest child back and forth from public school to a local Catholic parochial school during his grade school years. (May 19, 1997 A.M. Tr. p. 12).

Mr. Sterling Burke testified as a Petitioner. Both of his children have graduated high school and will not be affected by this petition. (May 30, 1997 A.M. Tr. pp. 1-12). Mr. Burke's family are former residents of Flossmoor, Illinois, and his older child, his son, attended Homewood-Flossmoor High School prior to their move to The Greens. (May 30, 1997 A.M. Tr. p. 11). His daughter attended Rich Central High School and graduated from Rich Central in May of 1997. (May 30, 1997 A.M. Tr. p. 12). Mr. Burke and his children are African-American. (May 30, 1997 A.M. Tr. p. 47). Mr. Burke explained that he signed the Petition because he felt the need to keep kids in the same school, grade school through high school; he felt that "made a lot of sense." (May 30, 1997 A.M. Tr. p. 17-18). He stated that to his knowledge, there were no African-Americans represented on the Petition's Committee of Ten. (May 30, 1997 A.M. Tr. p. 20). He also testified that he had talked about the Petition with Aldo De Angelis, the State Senator who had sponsored § 7-2b, after the law had been amended approximately 12 to 18 months before the date of his testimony. (May 30, 1997 A.M. Tr. p. 21-25). Mr. Burke was also the author of a controversial settlement proposal to District 227, whereby the Petitioners would agree to withdraw the Petition and cease litigation if District 227 would agree to allow the school boundaries to be changed voluntarily over a period of years. (May 30, 1997 A.M. Tr. p. 35-45).

Mr. Burke testified that Homewood-Flossmoor High School and Rich Central High School are mirror images of each other, one is 80% black and one is 80% white. (May 30, 1997 A.M. Tr. p. 47) . He admitted that "Rich Central is a good school," (May 30, 1997 A.M. Tr. p. 50), and that

there are positives and negatives to attending either school involved in the Petition. (May 30, 1997 A.M. Tr. p. 47). Mr. Burke felt that because his son was black, he experienced some problems at the predominantly white Homewood-Flossmoor High School. (May 30, 1997 A.M. Tr. p. 47). Mr. Burke rationalized that, "Girls tended to do well. Black boys tended to not do well." (May 30, 1997 A.M. Tr. p. 47). But as a black child at Rich Central High School, his daughter had difficulty because of "where we lived." (May 30, 1997 A.M. Tr. p. 48). The other black students at Rich Central caused his daughter problems because they, "wanted to change how she talked, how she dressed, some of the things that we thought she should do." (May 30, 1997 A.M. Tr. pp. 47 and 51). Nonetheless, Mr. Burke conceded to the Principal of Rich Central that he believed his daughter had more opportunities at Rich Central than she would at Homewood-Flossmoor High School. (June 5, 1997 P.M. Tr, p. 21).

Dr. Savio Manatt testified as a resident but not as a Petitioner. Dr. Manatt testified that his two children, aged 12 and 9, will never attend Rich Central High School even if he has to pay tuition for his children to attend Homewood-Flossmoor High School. (May 30, 1997 P.M. pp. 5, 10 and 22). He made this statement despite admitting to having no knowledge of Rich Central or its programs. (May 30, 1997 P.M. Tr. pp. 10-11). Until the 1996-97 school year, Dr. Manatt's children attended private school, either at a local Catholic elementary school or at the Morgan Park Academy in Chicago, Illinois. His children are currently attending schools in District 161. (May 30, 1997 P.M. Tr. pp. 5-7). He was adamant that the reason he signed the petition was because he wanted to keep the

children together in school from grade school to high school. He expressed concern about the future, because he felt that his older child, a boy, had experienced difficulty in adjusting to Parker Junior High after the move from Morgan Park Academy. (May 30, 1997 P.M. Tr. pp. 25-26) He admitted, however, that the transfer has left no lasting affects [sic]. (May 30, 1997 P.M. Tr. pp. 26, 30 ("at the present time, he is doing very well.")).

Mr. Roy Schweinforth testified as a Petitioner. He has three children, the youngest of which is 40, and therefore has no children who will be affected by the Petition. (June 9, 1997 A.M. Tr. p. 16). His children, however, are all graduates of District 227. (June 9, 1997 A.M. Tr. p. 16-17). He emphasized that he has three grandchildren currently attending District 161, although there is nothing in the record to show any of these children are residents of the Greens. He spoke very highly of District 161, and how he thought that the programs from one school "fed into" the high school. (June 9, 1997 A.M. Tr. p. 19) He also felt that the children needed the opportunity to stay with their peers through the school years. He stated that signing the petition was "the right thing to do." *Id.* Mr. Schweinforth also explained that he was an owner in the town home section of the Greens, where very few children lived and whose occupants were mostly senior citizen "empty nester" types. The issue of what high school district served the Greens did not seem important to those residents until the Petition made it "a moral type of thing." (June 9, 1997 A.M. Tr. p. 23). He also supported his reason for signing the petition by relating a story of how he had difficulty adjusting to a new school as a child when his

parents briefly relocated to Florida. (June 9, 1997 A.M. Tr. p. 25-28).

Mr. Kevin Woods testified as a Petitioner. He testified that he had been part of the Petition's original Committee of Ten. His reason for supporting the Petition was, in his opinion, the only valid reason the Petition existed; to keep the elementary students together with their peers when they went to high school. (June 9, 1997 A.M. Tr. p. 36) Mr. Woods then suddenly became very emotional, and had trouble continuing his testimony. (June 9, 1997 A.M. Tr. p. 37-39) He. said that when he was a child, his family relocated from Oak Lawn, Illinois, where he and his brother had attended a Catholic elementary school, to South Holland, Illinois, where they attended Eisenhower Junior High School, a public school in Elementary School District 151, in Cook County, Illinois. *Id.* He related that his younger brother experienced great difficulty with "older kids" at the new school, (June 9, 1997 A.M. Tr. p. 38), but did not elaborate what kind of difficulty, or whether it actually had anything to do with the fact his brother changed schools.

Mr. Anthony Mace testified as a Petitioner. Mr. Mace has two children enrolled in Western Avenue School in District 161. (June 9, 1997 A.M. Tr. p. 41). He supports the petition because he wants his children to go to high school with their grade school friends. (June 9, 1997 A.M. Tr. pp. 44-45). He felt that "continuity" provides the best education possible. (June 9, 1997 A.M. Tr. p. 43). Mr. Mace also felt that District 233's curriculum structure, drama programs, and swimming programs justified his support of the Petition. (June 9, 1997 A.M. Tr. pp. 45-46).

In addition to the Petitioners, Mr. Willis Brunson, an African American resident of District 227 (but not of the Greens) testified on behalf of District 227. Mr. Brunson is the former President of the District 227 School Board. He had served as a School Board member for 12 years, but currently is no longer a member. (June 5, 1997 A.M. Tr. p. 85). Mr. Brunson's testimony was short, involving a description of his family life and his children's positive experiences in District 227. (June 5, 1997 A.M. Tr. p. 85-90). In particular, Mr. Brunson testified that he was motivated to oppose the Petition in his official capacity as a Board member because he was concerned about the increased minority enrollment at Rich Central, and saw the new home construction and real estate development in the Greens, which had a substantial White population, as a means to develop a more diverse student body. (June 5, 1997 A.M. Tr. p. 91).

B. Expert Testimony.

District 227 presented four expert witnesses. They included an expert in "cultural pluralism," a psychiatrist, an urban sociologist, and a real estate appraiser. A summary of their testimony follows:

Dr. William Hazard, a Professor of Education at Northwestern University and author of several monographs concerning cultural pluralism, testified that both Rich Central High School and Homewood-Flossmoor High School are high quality schools which provide comparable educational opportunities. (May 19, 1997 A.M. Tr. p. 206). Dr. Hazard further testified that it is in the best interests of children from The Greens to attend Rich

Central High School rather than Homewood-Flossmoor because they would be exposed to a broader cultural spectrum at Rich Central. (May 19, 1997 A.M. Tr. pp. 210-211). Dr. Hazard also testified that it is in the best interests of children from The Greens to separate from their peers at the high school level because they will certainly separate from their friends after high school. (May 19, 1997 A.M. Tr. pp. 220-221). Dr. Hazard testified:

> In 33 years of trying to deal with some of those questions, I've yet to find any literature or research that would say there is any significant impact on the children by going to different high schools. As a matter of fact, typically, that's viewed as a maturing experience rather than a hurtful experience. (May 19, 1997 A.M. Tr. p. 222).

Dr. Hazard elaborated on the Petitioners' perceived need to have the students who attend Elementary School District 161 to attend the same high school as their grade school peers. He explained that the "whole child" or "community of interest" concepts grew out of outmoded assumptions that American families live in sharply defined communities. While this may have been true of rural, 19th Century America, the extended communities of the late 20th Century no longer support this view. Our modern cities do not allow a "community" to cease at the boundary of a city or school district. (May 19, 1997 A.M. Tr. p. 215-227).[37]

The "whole child" and "community of interest" standards, however, are still used by Illinois courts as valid

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[37] *See* discussion in Section VIII, *infra*.

criteria in determining whether to grant school boundary petitions under §§ 7-1 and 7-2 of the School Code. *Board of Education of Golf School District No. 67 v. Regional Board of School Trustees of Cook County*, 89 Ill. 2d 392, 433 N.E.2d 240 (1982).

Dr. Hazard tempered this issue by explaining the history of the use of the "whole child" standard by the Illinois Legislature. He stated that in the early 1980s, the General Assembly sought to generally enlarge the size of school districts. It was sort of a "bigger is better" viewpoint, where the Legislature clearly intended to seek to consolidate dual districts (where the high school and grade school districts are separate and distinct legal entities, such as District 161 and 233 in this case) into unit districts (where the elementary and secondary districts are a single K-12 district).

As time passed, however, this concept proved to be unwieldy and faulty, and after 1985, the Legislature "backed off." (May 19, 1997 A.M. Tr. p. 215-227). Thus, while it remains a legal standard for detachment proceedings in Illinois, Dr. Hazard offered credible and uncontroverted testimony to show that, at least in suburban areas such as the Greens, the concept of "whole child" and "community interest" has little practical value. Dr. Hazard particularly noted that if the Petitioners actually believed in this theory, so many of them would not send their children to private or parochial schools in other communities which take in students from a wide variety of communities. (May 19, 1997 A.M. Tr. p. 222). Ultimately, Dr. Hazard concluded that the proposed detachment would be a detriment to students at Rich Central High School because it would leave the minority students

at Rich Central with the sense that the white students and residents of the Greens did not want to attend school or be a part of their community.[38] Dr. Hazard's testimony is unrebutted.

Dr. Marvin Schwarz, a child and adolescent psychiatrist with extensive practice in the affected school districts, testified that freshman high school students naturally tend to restructure friendships based upon areas of interest and areas of involvement. (June 2, 1997 A.M. Tr. p. 89). Dr. Schwarz testified that restructuring friendships is an important step in the maturation process. (June 2, 1997 A.M. Tr. p. 89). Moreover, Dr. Schwarz testified that in 40 years of practice he has never treated a child for a disorder arising from attending a high school separate from grade school friends. (June 2, 1997 A.M. Tr. p. 90). In fact, there is no such disorder recognized by the American Psychiatric Association. (June 2, 1997 A.M. Tr. p. 90). Dr. Schwarz testified, "I've treated many children who change high schools, but I've never seen anyone where this has been the illness where this has caused a trauma." (June 2, 1997 A.M. Tr. p. 91). He testified that attendance at Rich Central High School is a social, economic, and racial benefit to children from The Greens. (June 2, 1997 A.M. Tr. pp. 94-95). He further testified that

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[38] Dr. Hazard specifically stated that "It would, I believe, act as a clear signal that they're not quite as good as their neighbor District 233 and that they may be a little blacker than they ought to be for good quality schooling, and I would hope that wouldn't be the implication, but it would be hard to overcome that if they see portions of their district trying very desperately to get out of it with no apparent educational advantage." (May 19, 1997 A.M. Tr. p. 229).

the proposed boundary change poses a distinct detriment to students at Rich Central High School:

> I think it's saying that the Whites don't want to mix with the Blacks. The Blacks aren't as good. There's a message to children who clearly understand what this is all about is that they are second class and is conveying to these children, to every child in that high school, that they are second class.

(June 2, 1997 A.M. Tr. p. 95). Dr. Schwarz's testimony is unrebutted.

Mr. David Richmond was qualified as an expert home appraiser, (May 29, 1997 A.M. Tr. p. 63), and testified regarding the relative value of homes in both District 227 and District 233. Mr. Richmond testified that homes have shorter marketing time in School District 233 than the same home in School District 227. (May 29, 1997 A.M. Tr. p. 72). Mr. Richmond also testified that there is a distinct difference for prices paid within the Homewood-Flossmoor attendance boundaries than those in the Rich Central attendance boundaries. (May 29, 1997 A.M. Tr. pp. 75-76). The outcome of Mr. Richmond's analysis shows that the market preference is for the homes in District 233. (Obj. Ex. No. 25). Mr. Richmond's testimony is unrebutted.

Dr. David J. Hartmann was qualified as an expert in the area of urban sociology and applied demography. (June 2, 1997 A.M. Tr. p.9-12).[39] Dr. Hartmann identified the racial demographics of the general area and the

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[39] Dr. Hartmann had testified in a similar capacity in the Homewood Acres petition. (June 2, 1997 A.M. Tr. p. 17-20).

school districts involved, and concluded that the long term affects [sic] of the proposed boundary change would be detrimental on the racial diversity and identifiability of both school districts. (June 2, 1997 A.M. Tr. p. 40-41).[40]

C. The Testimony of Educators.

District 227 presented the testimony of several educators, including school superintendents and principals. These included employees of District 227, as well as educators from other schools. A summary of their testimony follows:

Dr. Brian Knutson, Superintendent of Rich Township High School District 227, testified that several communities which feed his school district split students between more than one high school district:

1. Tinley Park's residents would go either to Rich Central in District 227, or to Tinley Park High School in Bremen High School District 228.

2. Country Club Hills would attend either Rich Central in District 227, or they would attend Hillcrest High School in Bremen School District 228.

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[40] Dr. Hartmann's testimony helps establish and support the notion that the Greens and the Homewood-Flossmoor community is a substantially White neighborhood, standing as an "island" in a community and area which has an ever increasing African-American population. His testimony also supports the raw statistics regarding the racial composition of the Greens, District 227, and District 233.

3. Olympia Fields students would attend either Rich Central High School in District 227 or Homewood Flossmoor High School in District 233.

4. Chicago Heights students would attend either Bloom High School in Bloom School District 206, Rich Central in District 227, or Rich East High School in District 227.

5. Matteson students would attend any of the three high school attendance centers in District 227, depending upon where they live, i.e. Rich Central, Rich East or Rich South High Schools.

6. Park Forest students would attend either Rich East High School in District 227 or Crete-Monee High School in Crete-Monee School District 201-U.

(May 12, 1997 A.M. Tr. pp. 74-75). All of these students separate from friends they made at the grade school level. (May 12, 1997 A.M. Tr: pp. 75-77). Dr. Knutson testified that to his knowledge, there is no educational research to indicate that separating from grade school peers at the high school level is a detriment to those students. (May 12, 1997 A.M. Tr. p. 79).

Dr. ~~Kenneth~~ Reczkiewicz, Principal of Rich South High School in District 227, agreed with Dr. Knutson's conclusion. Dr. Reczkiewicz testified that, upon graduation from eight [sic] grade, students from Huth Middle School are split between Rich Central High School, Rich East High School, and Rich South High School. (June 5, 1997 A.M. Tr. p. 107). Despite being split from their middle school friends, students from Huth Middle School

are very successful at Rich South High School, academically, socially and athletically. (June 5, 1997 A.M. Tr. p. 108). None of these students has needed special services or help as a result of being separated from grade school friends. (June 5, 1997 A.M. Tr. pp. 108-109). In fact, many of those students have performed exceptionally well at Rich South. (June 5, 1997 A.M. Tr. pp. 108-110).

Mr. Larry Tandy, Assistant Superintendent in Rich Township High School District 227, Acting Principal of Rich East High School, and former Principal of Rich Central High School, testified in a similar manner. Mr. Tandy's children attended Huth Middle School and separated from friends at the high school level. (May 30, 1997 P.M. p. 44). The separation had no adverse impact upon his children; they retained friendships from Huth Middle School and made new friends at their new high school. (May 30, 1997 P.M. p. 44). Moreover, as Principal of Rich Central and Rich East High Schools, he has observed no adverse impact upon high school students who have separated from their grade school friends. (May 30 1997 P.M. pp. 50-51).

Mr. Von Mansfield, Principal of Rich Central High School, testified to similar experiences in his observations of grade school students after they begin their high school years. Mr. Mansfield testified that as Principal at Rich Central High School, he has observed no adverse impact upon students who have separated from their grade school friends. (May 20, 1997 P.M. Tr. p. 19).

Dr. James Riordan, superintendent of Bremen Township High School District 228,[41] testified that his District's high schools also serve students split from their grade school friends, including students like those from The Greens who attended Flossmoor School District 161. (June 6, 1997 A.M. Tr. pp. 10-13). In fact, six different grade school districts split their students for attendance in Bremen Township high schools. (June 6, 1997 A.M. Tr. p. 10). Despite being split from their grade school friends, Dr. Riordan has observed that the students have had no problems with academics, socialization or discipline and has had no need to provide special services for those students. (June 6, 1997 A.M. Tr. pp. 15-16). Moreover, the students from Flossmoor School District 161 performed exceptionally well in high school becoming, for example, captain of the high school football team, homecoming queen and king, and National Honor Society members. (June 6, 1997 A.M. Tr. p. 17).

Dr. Gary T. Catalani, Superintendent of Thornton Township High School District 205,[42] similarly testified that his high schools are fed by students who split from their grade school friends. (June 6, 1997 A.M. Tr. pp. 31-32). Six different grade schools split their students for attendance at Thornton High Schools. (June 6, 1997 A.M. Tr. p. 32). Dr. Catalani has had no need to provide special services to these students and has not observed these

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[41] Dr. Riordan also provided personal testimony regarding the Homewood Acres Petition.

[42] Dr. Catalani also provided personal testimony regarding the Thornton Township § 7-2b petition.

students having academic or socialization problems. (June 6, 1997 A.M. Tr. pp. 32-33).

Mr. Ronald Patton, Superintendent of Bloom Township High School District 206,[43] has had precisely the same experience as Dr. Riordan and Dr. Catalani. Two grade school districts split their students from their friends to attend Bloom High Schools, and one of these districts is Flossmoor School District 161. (June 6, 1997 A.M. Tr. p. 80). Mr. Patton has not observed these students having problems with academics, socialization or discipline. (June 6, 1997 A.M. Tr. pp. 81-82). Mr. Patton testified:

> They assimilate into the regular high school setting and fare very well academically. They're involved in our extracurricular program, and they blend in quite well with no problems. There's definitely no need for any special support or services for them.

(June 6, 1997 A.M. Tr. p. 81).[44]

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[43] Mr. Patton also provided personal testimony regarding the Bradley Terrace § 7-2b Petition.

[44] In addition, District 227 subpoenaed Dr. Anthony Moriarty, the principal of Homewood Flossmoor High School. District 227 attempted to adduce evidence of racial discrimination in the practices and policies of District 233. We do not find this information particularly relevant to the issues relating to the actions of the Petitioners and the intent and effect underlying § 7-2b and the Petition. Without some evidence of complicity on the part of District 233 (and there was none seen), we see no relevance in much of Dr. Moriarity's testimony, except for where he verified matters relating to the racial statistics of his district.

VIII. ANALYSIS OF DISTRICT 227'S ALLEGATIONS

A. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the United State [sic] Constitution provides that "[n]o State shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws." § 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983), the enforcement apparatus for the Equal Protection Clause provides a cause of action for the deprivation of rights secured under the Constitution and federal law when such rights are infringed under the color of state law. In order to prove its allegation of racial discrimination under the Equal Protection Clause, District 227 must show that the Petition was created under the color of state law (*i.e.* that there was state action present in the process which created or granted the Petition), that the Petition was created or granted with discriminatory intent, and that allowing the Petition will have a discriminatory affect [sic] or impact. *See Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 492 U.S. 252 (1977); *Apostol v. Landau,* 957 F.2d 339 (7th Cir. 1992).

1. *The State Action Requirement*

The Petitioners argue that there is no "state action" in this case because to act "under color of state law," a private citizen must work jointly with the State of Illinois or its agents while acting in conformity with a statute or ordinance. *Bd. of Educ. Of Dist. 53 v. Bd. of Educ. Of Dist. 52* 413 F. Supp. 342 (W.D. Okla. 1975). District 227 argues

that because the Trustees of Schools have acted as a state governmental authority in granting the Petition, there is State action sufficient to find that the Petition was granted "under color of state law."

Generally, state action is found only where a governmental body, such as a court, commands the conduct which causes the equal protection deprivation. For example, private individuals can be held to be acting under the "color of state law" when they seek the enforcement of a facially neutral private agreement or state law which has a discriminatory effect through the state's court system. The classic case of *Shelly v. Kraemer,* 334 U.S. 1 (1948) held that the use of the court system by a private individual to enforce racially restrictive real estate covenants via the common law of contracts (which is race-neutral in concept) constituted state action for Equal Protection purposes. The § 7-2b petition process is similar in that no petition can be effective without an administrative agency (in this case, the Township Trustees of Schools) holding a hearing and approving the Petition.

District 227 brings *Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614 (1991) to our attention. *Edmonson* involved a private citizen who was embroiled in litigation using preemptory challenges to exclude jurors because of their race. The Court held that when private parties make extensive use of state procedures with the overt, significant assistance of state officials, there is state action for purposes of the Fourteenth Amendment. Because the Bloom Township Treasurer had to act in accepting and processing the Petition, and the joint board of the several Township Trustees held a hearing upon and granted the Petition, there is enough "overt, significant assistance" of

government officials to meet the state action requirement.[45]

The participation of the Township Trustees of Schools and their action taken in granting the Petition also satisfies the "state action" requirement of § 1983 and the Equal Protection Clause because the Township Trustees are actually units of local government.[46] The Trustees of Schools have long been recognized as state officers similar to boards of education. *Scown v. Czarnecki*, 264 Ill. 305, 106 N.E. 276 (1914) (School Trustees, boards of education and similar instrumentalities for the control of the education of the people are political officers of the government). As a creature of the legislature acting pursuant to a state statute, the Township Trustees of Schools are acting "under color of state law" in this proceeding. *See Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989) (State officials acting pursuant to a state statute act under color of state

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[45] As argued by District 227, the Federal District Court did make an express finding that there was state action in this case because the Trustees were required to approve the Petition. *Committee of 10 v. Bd. of Educ. of District 227*, 94 C. 446 (N.D. Ill.), Transcript of Proceedings, Oct. 27, 1994, p. 14. This finding, however, was not included in a published opinion, and therefore has no precedential value. We note it simply as evidence which further supports District 227's position.

[46] The Illinois School Code states that the Township Trustees of Schools "shall be a body politic and corporate, 11 to be "elected by the qualified voters of the township . . . with power to sue and be sued . . . in all courts and places where judicial proceedings are had." Ill. Comp. Stat. ch. 105 § 5/5-2 (1996).

law for purposes of federal civil rights provision regardless of whether state law gave them any discretion in carrying out their duties).

Edmonson also states that when the alleged "state actor" is performing a traditional function of government, the actor is operating "under the color of state law." The operation of public schools has long been the responsibility of the state and its political subdivisions. Detachment petitions are used in an attempt to alter public school district boundaries, where districts, through their local school boards, are undeniably the political subdivisions of a state. *Hostrop v. Board of Junior College District 515*, 523 F.2d 569, 576-77 (7th Cir. 1975).

The court in *Edmonson* also found the involvement of a traditional function of government. The Court found that the preemptory challenges are used in selecting a jury – an entity that is unmistakably a governmental body. The court further noted that in the jury selection process, the government and private litigants worked for the same end. Similarly, in the creation of public schools and public school boundaries, the state and private parties also work together for the same end – providing a publicly funded education for all of the children of the state. Local officials, such as the Township School Trustees, act in a more parochial manner in seeking to serve the students of the schools within their particular Township. The interrelation of the public and private sectors is still at work. Accordingly, this case involves traditional governmental functions under *Edmonson*, and thus there is "state action" for Fourteenth Amendment purposes.

Examining other Supreme Court precedent leads to similar conclusions. In *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), a private citizen/creditor used a facially neutral procedural statute to hold an *ex parte* hearing before a state court judge, where the creditor alleged that a debtor might dispose of property which could be used to pay a debt owed to the creditor. The procedural law allowed the creditor to seize the property without offering the debtor a hearing to defend his rights. The Court determined that the action of the court in enforcing this statute was state action, particularly because the statutory. procedure itself was unconstitutional. *Id.* In § 7-2b, the Illinois Legislature has arguably enacted just such an unconstitutional statutory provision. § 7-2b states that, "The Regional Board of School Trustees shall have no authority or discretion to hear any evidence or consider any issues except those that may be necessary to determine whether the limitations and conditions of this Section have been met." The legislature has, in effect, barred any school district affected by a § 7-2b petition from raising the issue of racial discrimination as a defense; or any substantive defense, for that matter. The Supreme Court has expressly forbidden legislative bodies from enacting statutes which "restrict, abrogate, or dilute" the guarantees of the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641 n.1 (1966). Because the procedural confinements of § 7-2b restricted the ability of District 227 from bringing its constitutional claims before a finder of fact,[47] it is improper. The use of this improper procedural

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[47] This line of reasoning does not abrogate the issue presented in Section I, supra, that the Trustees do not have the

block upon District 227 constitutes "state action" for Fourteenth Amendment purposes under the *Lugar* Court's analysis.

The arguments presented by Petitioners regarding the existence of state action in this case seems to indicate that there needs to be some kind of overt conspiracy between government officials and the Petitioners before state action can be found. Petitioners' Post-Hearing Brief at 26-27. There is, however, enough evidence of joint

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power to hear constitutional issues. The Administrative Review Law has procedures built into it for the raising of constitutional issues upon administrative review. The prohibition upon not allowing the Trustees to consider the constitutional evidence at all runs the risk of causing aggrieved school districts to not present the constitutional issues at all, possibly causing the issue to be waived on Administrative Review. In addition, the tenor of the statutory ban on evidence other than the Petition's technical and procedural requirements is ostensibly the source of the more than four year delay in reaching the totality of the merits in this case. Without the language of evidentiary limitation, the evidence regarding discriminatory intent and effect could have been presented to the Trustees and preserved for review at the first hearing in January 1994. There would have been no need for District 227 to attempt to enforce its constitutional rights in federal court, because the constitutional issues would have been properly part of the record from the outset. While the Trustees would not have had the ability to make a ruling on constitutional issues at that first hearing, the evidence would have been part of the first administrative review proceeding, and would have been presented to the Circuit Court within months of the Trustees' determination. District 227 and its attorneys therefore cannot receive the full brunt of any complaints regarding the time it has taken to litigate this Petition.

activity between agents of state government and the Petitioners to find that the Petitioners acted "under color of state law," even if such evidence is circumstantial. § 7-2b's sponsor, State Senator Aldo De Angelis, specifically stated on the floor of the State Senate that:

> "[A]cross Cook County, where the majority of the dual districts are, there are little pockets – little pockets of schools that are not allowed to – areas that are not allowed – the children are not allowed to go to the same high school as their classmates. Now, within my district, yes, there is one junior high in which 90% of the children go to one high school, the other 10% go to four. In fact, in one instance, one person had to go to a high school different, and [in] another situation, three students. So I put in a bill that permitted people from those areas [to detach and annex] in which the [equalized access value] was less than 10% [because I realize such a detachment could cause financial discomfort to the losing school district]."

88th General Assembly, State of Illinois, Regular Session Senate Transcript at 21-27 (121st Legislative Day, May 18, 1994).

We believe that the evidence presented to the Trustees shows that four of those "pockets" have been involved in detachment proceedings, three of them under § 7-2b; Homewood Acres, Bradley Terrace, Thornton Township, and the Greens. All four of those "pockets" lie within Senator DeAngelis' district. It is not hard to discern that the "one" school that splits into four high schools is Elementary District 161, which is the very situation involving the Greens. Indeed, from Mr. De

Angelis' comments, the Trustees could logically conclude that § 7-2b was special legislation enacted particularly for the residents of the Greens. There is evidence that at least two of the Petitioners admit to speaking with Senator De Angelis; one (Sterling Burke) admits to discussing the statute with him around the time the statute was amended.[48] That the statute was amended several times to ostensibly coincide with adverse rulings on different versions of the Greens Petition and other § 7-2b petitions is more than coincidence. That the latest amendment to the statute contains provisions allowing for the withdrawal of a § 7-2b petition and the voluntary change of districts by students within the affected area, matters which are strikingly similar to the settlement terms proposed by Mr. Burke to District 227, also seems too great a coincidence. We find that the evidence of the intent of the sponsor of the legislation, the sponsor's overt actions in repeatedly amending the statute, the action of some of the Petitioners with the act's sponsor, and the use of the statute to directly benefit residents within the sponsor's district is enough evidence to find "state action" even under the more restrictive test the Petitioners suggest.

For all of the above mentioned reasons, we believe District 227 has shown that there is "state action" in this

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[48] The other petitioner who admitted speaking with Senator De Angelis was Mr. Bruce Peterson. Mr. Peterson denied talking about the Petition with the Senator. But Mr. Peterson also denied knowing that Rich Central High School had a primarily African-American student population. Seeing as that issue is the crux of this case, we find the totality of Mr. Peterson's testimony to be at least partially suspect.

case sufficient to allow a claim under the Equal Protection Clause.

2. *Discriminatory Intent.*

In order to establish a violation of the Equal Protection Clause, District 227 must show that § 7-2b or the Petition. were motivated by a racially discriminatory intent or purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977). Such intent, however, need not be absolute proof of evil motives, overt racial hostility or a subjective desire to harm black children. *United States v. School District of Omaha,* 521 F.2d 530, 535 (8th Cir.1975); *Higgins v. Board of Education of Grand Rapids,* 508 F.2d 779 (6th Cir. 1974); *Oliver v. Kalamazoo Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974). Indeed, it is truly rare in this day to see blatant manifestations of public bigotry, such as a prohibition on African-Americans serving on juries. *See Strauder v. West Virginia,* 100 U.S. 303 (1880). Discrimination in the 1990s is much more subtle; and the intent which the Courts look for is merely the intent to cause a separation of the races. *Omaha,* 521 F. 2d at 535.

Even if the Petitioners were well-motivated (*i.e.* they do not hate or even dislike African-Americans), but their intent is still purposely segregative, the intent would be improper under the Equal Protection Clause. For example, the Petitioners might believe that the students from the Greens would get a better education at a primarily

Caucasian school. Such intent is still purposefully segregative, and therefore improper under the Equal Protection Clause. *See Reed v. Rhodes*, 455 F. Supp. 516, 555 (N.D. Ohio 1978).

Similarly, District 227 is not required to prove that the Petition rests solely on racially discriminatory motives. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). The *Arlington Heights* court stated that a plaintiff need only prove that discriminatory purpose has been a motivating factor in the decision. *Id.* Once discriminatory purpose is established, the burden shifts to the defendants to "adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973). However, it is not enough for the defendants to show a logical, racially neutral reason for their actions, but to adduce proof sufficient to support that segregative intent was NOT among the motivating factors. *Id.*

We believe that there are two areas where intent is manifest in this case; both of them work together to show proof of segregative intent in this case. The first is the statute itself and its history; the second is the application of the statute to this case and by comparison to other cases.

District 227 argues that there is direct evidence of discriminatory intent in this case, particularly from the testimony of Petitioners Cox and Burke. We would not be so bold as to attach discriminatory motivation to the statements made by Mr. Cox, Mr. Burke, and some of the

other Petitioners. We do believe, however, that statements made by the Petitioners are part of a web of circumstantial evidence which show a general segregative intent on the part of the legislation and the Petitioners in this case.

History shows that such circumstantial evidence of discrimination can be found in the administration of a facially neutral statute. For example, in the classic case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), a San Francisco city ordinance barred the operation of hand laundries in wooden buildings except with the consent of the City Council. The Council gave permits to any one who applied for permission to operate such a business – except for anyone of Chinese descent. Even though the ordinance was non-discriminatory in its language, the Court held that discrimination in its administration violated the Equal Protection Clause.

A facially neutral statute can be proved discriminatory through circumstantial evidence. In *Rogers v. Lodge*, 458 U.S. 613 (1982), Burke County, Georgia had used an "at-large" system to elect its 5 member Board of Commissioners since 1911. Whites held only a slight majority in the population of eligible voters, but no African-American had ever been elected to the Board. The Court held that despite the fact that the at-large system was racially neutral and had not been originally adopted for discriminatory purposes, the election procedures had been kept in place by the Georgia Legislature for discriminatory purposes, and had a discriminatory impact on the County's Black citizens. In addition to the evidence that no Black had ever been elected to the Board, the Court noted that there had been a history of discrimination against Blacks in County elections; County officials were

historically unresponsive to the needs of the Black community; and the County's representatives in the legislature, who were all White, wanted to maintain the status quo. The *inference of* intentional segregation suggested by the circumstances was enough for the Court to invalidate the statute. *Id.*

The *Arlington Heights* Court also outlined other ways to show circumstantial evidence of discriminatory intent. For example:

1. The historical background of the statute or action may reveal discriminatory purpose;

2. The "specific sequence of events" leading up to the event in question may "shed some light" on the underlying purpose. The *Arlington Heights* Court suggested the example of a zoning case, where property which had been historically zoned residential was suddenly changed to another classification when integrated housing was proposed for that site;

3. Departures from the "normal procedural sequence" might show improper purpose;

4. "Ignoring substantive factors:" Where factors normally important in arriving at a decision are ignored or changed, it may be evidence of improper motive; and

5. The legislative or administrative history of the statute in question could also reveal discriminatory or segregative intent.

Arlington Heights, 429 U.S. at 267. We believe the evidence presented to us reveals that § 7-2b was enacted and the

Petition came into being through improper segregative intent.

The statute itself is facially neutral.[49] The stated intent of the statute, as it can be implied from the statute's express language and from the testimony of the bill's sponsor, is to "consolidate" the grade school and high school students living within the area to be detached, or, in other words, to allow elementary school students to continue onto grades 9-12 with the same group of peers with which they attended grade school. Indeed, the direct testimony of each Petitioner echoed the *shibboleth of* "we only want to keep the kids together when they go to high school." However, even where there is substantial evidence of proper motivation for legislation, the Supreme Court will not accept it if it appears to be a sham. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2583-87 (1987). If the intent embodied in the legislative history and the ultimate affect [sic] of the law is shown to be improper, the Court will strike it down. *Id.*

We believe the stated reason for enacting and using § 7-2b is a sham, and that the circumstantial evidence of the legislative history and the use and application of the law reveal improper discriminatory and segregative intent. The law's sponsor specifically stated that the law

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[49] The most recent amendment, however, introduced a clause which required the school districts involved in a § 7-2b petition to ignore the Armstrong Act (Ill. Comp. Stat. ch. 105 § 5/10-22.5 (1996)), which requires Illinois school districts to maintain racial balance within its boundaries in multiple attendance centers. The affect [sic] of this language is discussed *infra*.

was intended to apply only to "dual districts" in the Cook County area. However, it was not intended for all dual districts, but only for those with "pocket" areas which fit the criteria of the statute. Specifically, the sponsor described an area which we believe could only be the Greens. Therefore, we presume the Greens fits into what Senator De Angelis intended as a "pocket."

The demographics of the Greens reveal a neighborhood with a substantially White population seeking to detach from a substantially Black school district and annex to a substantially White school district. We also note that at about the same time, two other "pockets" within Senator De Angelis' district, Homewood Acres and Bradley Terrace, also areas with substantially White populations, also sought to detach from substantially Black school districts and annex to the same substantially White school district to which the Greens seek annexation. Shortly thereafter, two more "pockets" within or nearby Senator DeAngelis' district (Cherry Hills and the Lansing neighborhood which sought to deannex from Thornton Township District 205) which have substantially or even wholly White populations used § 7-2b to: 1) detach from a school with a Black population which was nearing 50% and annexed to a school with nearly 100% white enrollment (Cherry Hills); or 2) change districts where the demographics were nearly the same as the Petition now before us (Lansing/Thornton Township).

Senator De Angelis' speech on the Illinois Senate floor also railed against any attorneys who would raise constitutional issues. He was proud of the fact he had closed this loophole in the statute by prohibiting the introduction of an Equal Protection claim, because he

wanted such Petitions to be "judged on the merits." As argued in section VIIIA, *supra,* this limitation may be improper because it potentially "restricts, abrogates, or dilutes" the guarantees of the Fourteenth Amendment. *Katzenbach v. Morgan,* 384 U.S. 641 n.1 (1966).

Further, some of the types of circumstantial evidence held to be germaine in *Arlington Heights* are present in the legislative history and application of § 7-2b. § 7-2b was a radical departure from the standards of proof normally required in a school district detachment petition under §§ 7-1 and 7-2 of the School Code. By requiring that the Trustees only consider the technical factors related to the Petition, the Trustees were expressly forced to ignore the issues of the best interests of the students; the benefits and detriments to the districts involved; the benefits and detriments to the surrounding community; and whether there might be serious harm to the educational resources of a district. *Board of Education of Golf School District No. 67 v. Regional Board of School Trustees of Cook County,* 89 Ill. 2d 392, 433 N.E.2d 240 (1982). Despite the Petitioners' express desire to see "peer togetherness" of students through grade 12, technically, § 7-2b requires that the "whole child" and "community of interest" standards, and even parental preference and convenience *must* be disregarded. Why would Senator De Angelis expressly intend to not only block evidence regarding civil rights claims (where if such claims were without basis, one might understand the nuisance factor) but also an entire body of established Illinois case law designed to protect parents, students *and* school districts from detrimental boundary changes? Under *Arlington Heights,* we can surmise that the circumstantial evidence of requiring the

trier of fact to ignore factors which were usually considered important to making school boundary petitions in the past is evidence of discriminatory intent. This is particularly clear where District 227, as the school which would lose out in this Petition, and any parents or residents who oppose the boundary change who would otherwise have standing to object to the Petition are without redress regarding *any* issue, let alone Equal Protection of the laws. The manifest intent of this statute was to push the boundary change through on the fast track, before any opposing issues (including race discrimination) could be raised.

Also, the evidence that the statute was amended frequently, usually timed to coincide with an unfavorable ruling on a petition from one of the aforementioned "pockets," also fits into the *Arlington Heights* criteria. The "specific sequence of events" combined with an ever changing procedural track for these Petitions indicates that Senator De Angelis and his supporters in the Legislature were constantly altering the legal landscape to allow for these Petitions to pass. The most recent amendment, which not only took away jurisdiction from the Trustees and gave it to the State Board of Education (thus completely transforming the procedural format), but added a new series of heretofore unknown remedies regarding withdrawal of the Petition and the paying of out-of-district tuition turns the whole tradition of §§ 7-1 and 7-2 procedures on its head. While the legislature is certainly within its power to alter the procedures for bringing detachment petitions, these constant and abrupt changes are indicative of discrimination in light of the warning signals outlined in the *Arlington Heights* case.

Even more direct evidence of discriminatory intent is found in the most recent amendment. The latest version of § 7-2b requires the Trustees to ignore the Armstrong Act (Ill. Comp. Stat. ch. 105 § 5/10-22.5 (1996) when allowing for this new remedy of letting students within the affected area attend the new district without the territory actually being annexed. The Armstrong Act requires school districts to maintain racial balance within a district as between different attendance centers. This amendment amounts to the legislature ordering school districts to ignore racially a segregative affect [sic] should it occur. This is a clear violation of the directive that the legislature cannot "restrict, abrogate, or dilute" the guarantees of the Fourteenth Amendment *(Katzenbach v. Morgan,* 384 U.S. 641 n.1 (1966)), particularly where such guarantees are expressly protected in another statute! Further, abrogation of the Armstrong Act is the clearest example discussed herein regarding a statute requiring the finder of fact to ignore factors which had been traditionally important. Here, the Illinois Legislature is throwing out something it itself declared important years before. The only conclusion we can reach regarding § 7-2b is that it was motivated by discriminatory and segregative intent.

Using the *Yick Wo, Rogers, and Arlington Heights* cases as a guide, we firmly believe that the circumstantial evidence shows that § 7-2b was specifically intended to be used by White neighborhoods to pull out of primarily Black schools and escape to primarily White schools. This is improper segregative intent under the Equal Protection Clause.

Under the *Keyes* case, however, the Petitioners are allowed to rebut any evidence of segregative intent, and show that such intent was not a factor in bringing the Petition. As such, the Petitioners argue that the evidence adduced through the testimony of those who signed the Petition shows that discriminatory intent was never a motivation for bringing the Petition. Specifically, the Petitioners argue that their testimony shows that there was. no financial motivation to increase property values. They also argue that while many of the students in the Greens attend parochial schools rather than Rich Central, this should not be presumed to indicate racial bias. Finally, the Petitioners continue to emphasize that the only real issue is the best interests of the kids, which, they believe, is a need for "peer togetherness."

The "peer togetherness" issue is a weak argument. The evidence presented through the various local educators and expert witnesses shows that the "dual district" concept, *i.e.*, where a student will attend a different high school and elementary school and where those districts will not share the same boundaries, is the norm in the south suburban area in which the Green is located. Indeed, it appears to be a rare occasion when a student in this geographic area attends a Unit School district, or separate grade school and high school districts with identical boundaries. Not a shred of evidence was presented which could show that the issue of changing high schools after a child graduated from grammar school was actually a detriment.

All of the instances related by the individual Petitioners had nothing to do with this issue, and were usually examples of a family relocating to a new community,

or a child changing schools while still in elementary school.[50] In each of those instances, even where there may have been evidence of some initial difficulty in adjusting to a new school, there was absolutely no evidence of any long lasting ill effects from among the examples in the Petitioners' testimony. This was supported by the testimony of the many educators presented by District 227, who to a man stated emphatically that they have never experienced any difficulty in a child changing peer groups when entering high school. The testimony of Dr. Hazard and Dr. Schwarz confirmed this, and added that the experience of peer group change as a student enters high school is actually beneficial and desirable.

Even if we were to look to the traditional proofs required to show a "community of interest" or the "whole child" concept, the Petitioners fall woefully short of establishing it as a valid reason for bringing the Petition. The test for "community of interest" usually looks to see if there would be increased participation in school activities by the students and their families and whether the educational, social, and extracurricular needs of the students could be satisfied. *Board of Education of Golf School District No. 67 v. Regional Board of School Trustees of Cook County*, 89 Ill. 2d 392, 433 N.E.2d 240 (1982). Parental

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[50] These examples have noting [sic] to do with traditional concepts of "community of interest" or the "whole child." *See* Section II, *supra*. Rather, they deal with an individual person's or family's personal choices regarding where to live or whether to send their child to public or parochial schools, all of which have nothing to do with the evidence traditionally presented to prove a petition is in the "best interests" of children, and are matters which are completely out of a school district's control.

preference and convenience could be a factor, but could not itself be the sole determination. *Eble v. Hamilton*, 52 Ill. App. 3d 550, 367 N.E.2d 788 (3d Dist. 1977).

The Petitioners did not prove these factors either. The Petitioners' testimony and the stipulated facts reveal that Rich Central and Homewood-Flossmoor are both quality schools, with the only difference being a preference by some Petitioners for certain extracurricular activities in District 233. The Petitioners who thought there might be a unified curriculum between Elementary District 161 and High School District 233 knew nothing of such a curriculum and could not show it actually existed. Some expressed some notion that District 233 was a better school, but none of this was quantified. Indeed, either school could pass the "community of interest" test using the Greens demographics. The "peer togetherness" issue is therefore not compelling.

We agree with the Petitioners that it appears that an increase in real estate valuation could not be a motivating factor in signing the Petition. The 4 to 5 year long litigation fight, combined with the legal expense which the Petitioners have experienced does not justify the supposed gain they will see in their home values, particularly when most of the Petitioners indicated that they were not planning to sell their homes any time soon. But the determination which Petitioners have shown is indicative of a desire to accomplish their goal. The evidence, however, shows that the purpose of their goal is tainted by improper segregative intent.

We also agree that merely because certain Petitioners send their children to high school at a parochial school in

another community after attending grade school in District 161 is not necessarily indicative of racial bias. But when combined with the other evidence, this evidence does help support the view that the Petition had its genesis in improper segregative intent. For example, Ms. Donna Vander Luitgaren and Ms. Mary Ellen McKeowen have children who have attended Grade School District 161, but who attended Marian Catholic High School in Chicago Heights, Illinois upon matriculation. They have students currently enrolled in District 161, and state that these children will attend Marian Catholic, or at least the parents desire that the child to do so. This behavior does not necessarily indicate racial bias. But if the reason these parents signed the petition was "peer togetherness," their families' actions indicate they do not believe in the concept. The statistical evidence presented in the exhibits attached to Petitioners' Post-Hearing Brief also indicates that at least since the inception of this Petition, all of the White high school students who reside in the Greens attended Marian Catholic High School, while all of the Black students attended Rich Central. The circumstantial evidence related to the issue of Greens students at parochial schools only serves to either support the segregative intent of the Petitioners or to refute the alleged nondiscriminatory motivations.

Indirect segregative intent can be found in other Petitioners' testimony. Keith Cox's statements, while not blatantly racist, reflect an understanding of the community which feeds established racial stereotypes, specifically, that a school with a primarily black student body has an effect on real estate values. Was Mr. Cox really concerned that the African-American population at Rich Central

would affect his real estate values? Probably not. But his refusal to deny the substance of the quote attributed to him reflects a certain underlying community identity. Unfortunately, that identity appears based upon a Black/White dichotomy, and reflects a desire to be separated from the community identified with Rich Central (whose students are primarily Black), and exclusively identified with the community of Homewood-Flossmoor High School (whose students are primarily White). In our opinion, this is the essence of segregative intent.

Sterling Burke and Karla Inwood also made indirect references to segregative intent. Ms. Inwood, who is White, felt that enrolling her son in public school "was a mistake" and that she had a bad experience with District 227 schools. She expressed a dislike for "the people he went to school with" and said her son fell in with a "wrong group." (May 19, 1997 A.M. Tr. pp. 41-44). Mr. Burke, who is Black, felt that his daughter, who lives in a substantially white neighborhood, had problems with other Black students at Rich Central. These Black peers "wanted to change how she talked, how she dressed, some of the things that we thought she should do." (May 30, 1997 A.M. Tr. pp. 47 and 51). Combined together with all the other indirect evidence presented to the Trustees (and considering the Rich Central's enrollment statistics and the races of these particular residents), these statements add to the total picture of a community bent on segregating themselves from Rich Central's students. Because Rich Central's students are primarily Black, we must conclude that this represents improper intent under the Equal Protection Clause.

The totality of the circumstantial evidence in this case, including the legislative history and sequence of events which make up the amendments to the statute; the statute's departure from established procedures under traditional school detachment law; the statute's express command to ignore or change important factors which have been traditionally part of school detachment law; the failure of the Petitioners' to either prove the validity of their stated reasons for signing the Petition, or in showing that there was no possible discriminatory or segregative motivation for the Petition; and the evidence of implied segregative intent in the statements of many of the Petitioners tends to lead us to believe that District 227 has established that there is discriminatory intent which is violative of the Equal Protection Clause. It also leads us to believe that the only reason this statute exists is to provide White neighborhoods with the ability to move out of Black school districts. Even if it could be shown that § 7-2b could be or has been used in a racially benign situation, we believe the statute was improperly motivated.

As we have stated, though, this does not mean that we believe the Petitioners are racists. The law provides that an intent to segregate a community based on race is enough to violate the Equal Protection Clause. The evidence shows that the Petitioners vehemently do not wish to be a part of the community of Rich Central High School. Their alleged non-discriminatory reason ("Peer Togetherness") has been shown to be non-compelling, or at least not supported by the facts of this case. Therefore; the only reason which remains, the only reason which shows a difference between the two districts involved, is

the racial makeup of the student population. We must therefore conclude that segregative intent was at the foundation of the Petitioners' motivation.

3. *Impact Of The Proposed Detachment*

In order to prove a violation of the Equal Protection Clause, District 227 must also show that the impact of § 7-2b and the Petition has a discriminatory and segregative affect [sic]. District 227 presented evidence regarding the actual impact the Petition has had on the students at School District 227 and those students who will be assigned to School District 233 if the detachment is granted Petitioners have attempted to analyze the impact of this detachment by focusing on the number of high school age students residing in The Greens who currently attend Rich Central High School. Petitioners argue that because the percentages involving the current Rich Central enrollees is so low, there is no real impact on either school district. However, we note that since this Petition was filed in December 1993, the only students from The Greens who have attended Rich Central High School are African-American students. (Obj. Ex. No. 7, Jt. Stip. No. 19). In the same time frame, no white high school student residing in The Greens has attended Rich Central High School. *Id.* (Obj. Ex. No. 7, Jt. Stip. No. 19).

Further, the statistics regarding the racial composition of the Greens and the respective high schools show the Petition will have a negative impact. This is particularly true when looking at the grade school and preschool population of the Greens. This pool of students is significantly White, with the ability to help preserve

diversity at Rich Central. Switching these students to District 233 will only support the current disparity of races at each of the schools. This concept is also supported by the testimony of Dr. Hartmann, who described District 233's school as a "white enclave" surrounded by predominately black areas.[51] (June 2, 1997 A.M. Tr. Pp. 35-36). The impact of the Petition only serves to reinforce the fortress mentality of this "enclave." The evidence of the other Petitions in Homewood Acres, Cherry Hills, Thornton Township, and Bradley Terrace[52] also support how § 7-2b's only impact has been to attempt to move or actually accomplish the move of White neighborhoods out of Black School districts.

Additionally, there was evidence adduced of the negative impact this Petition would have on the minority students at Rich Central High School. For example, Dr. Hazard posited that "[The Petition] would, I believe, act as a clear signal that [the minority students at Rich Central are] not quite as good as their neighbor District 233 and that they may be a little blacker than they ought to be for good quality schooling, and I would hope that wouldn't be the implication, but it would be hard to overcome that if they see portions of their district trying

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[51] Or, as Senator De Angelis dubbed it, a "pocket" area. 88th General Assembly, State of Illinois, Regular Session Senate Transcript at 21-27 (121st Legislative Day, May 18, 1994).

[52] It is interesting to note that the Petitioners actually admit in their Post Hearing Brief that the impact of both the Homewood Acres and Thornton Township Petitions were "disheartening" because of "evidence of misplaced racial perceptions" and the "high percentage of Caucasian students involved. Petitioners' Post Hearing Brief, at 29.

very desperately to get out of it with no apparent educational advantage." (May 19, 1997 A.M. Tr. p. 229). This concept is at the very heart of *Brown v. Bd. of Education*, 347 U.S. 483 (1954), where the Supreme Court determined that one of the primary evils of discrimination and segregation in the public schools is that it gives Black students a sense of inferiority, which in turn impairs their motivation to learn and their ongoing success in school. Direct testimony of District 227 educators reveals that this type of thing is already happening in the district before the Petition is granted. *See* May 30, 1997 P.M. Tr. p. 58. Therefore, we feel that, in light of the guidance offered by *Brown*, there is evidence of improper discriminatory and segregative impact in this case.

4. ***Conclusion.***

For all the aforementioned reasons, we believe that District 227 has presented evidence showing "state action" (in the prior granting of the Petition by the Trustees, the actions of the sponsor of the legislation, and the joint activity by the sponsor of the legislation and Petitioners and other citizens who availed themselves of § 7-2b); improper intent (as shown in the legislative history – primarily through direct statements of the bill's sponsor, the circumstantial evidence of the application of the law to the Greens and other communities, and the same type of evidence which revealed segregative intent on the part of the Petitioners and failed to support the Petitioners' claim that they did not have improper intent), and disparate impact (in the patterns of attendance by the

students who live in the Greens, the negative demographic affect [sic] of § 7-2b, and the evidence of actual and potential negative psychological impact on minority students). Therefore, we believe this evidence shows that § 7-2b and the current Petition violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

B. Title VI

Title VI of the Civil Rights Act of 1964, (42 U.S.C. § 2000d *et seq.)* states that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI's intent is to provide for equal rights, stated in terms of racial equality. *State of Louisiana v. London,* 335 F. Supp. 585, 588 (E.D. La. 1971). Its purpose is to prevent entities receiving federal funds (*i. e.,* school districts) from committing or allowing an act which has a greater adverse impact upon one race compared to another.

In order to establish a *prima facie* case under Title VI, District 227 must show that a facially neutral practice has a disproportionate, adverse effect upon a group protected by Title VI (i.e., racial minorities). *Elston v. Talladoga County Board of Education,* 997 F.2d 1394, 1407 (11th Cir. 1993). The burden then shifts to the Petitioners to establish a substantial, legitimate justification for approving the proposed detachment. *Id.* If petitioners satisfy this

requirement, the burden shifts back to District 227 to prove that petitioners' proffered justification is pretextual. *Id.*

In *Lau v. Nichols*, 414 U.S. 563 (1974), the court held that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds, but also in those endeavors that have a disparate impact on racial minorities. Specifically, the *Lau* Court held that school districts are forbidden, by Title VI to practice unintentional as well as intentional discrimination against racial minorities. In *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983), the Court held that, at the very least, the implementing regulations of Title VI encompass, and therefore prohibit, impact discrimination.

It is clear that Title VI and its implementing regulations apply to School District 227. Arguably, because we are the facilitators and managers of public school funds in our respective Townships, each of the individual Boards of Township School Trustees are also subject to Title VI's limitations. As a result, if there is evidence of a Title VI violation in this case, we would be required to deny the Petition.

We believe the discussion in Section VIII A, *supra*, shows that § 7-2b is a facially race-neutral statute which has been applied in a racially discriminatory and segregative manner, resulting in a disproportionate impact upon African-Americans. When the burden shifts to the Petitioners, the aforementioned discussion of the evidence shows that the proffered reason – "Peer Togetherness" really has little or no validity. The Petitioners cannot

show that the failure to keep grade school peers together in high school has any damaging effect, and their own testimony regarding the possibility or reality of such difficulties were either distinguishable, irrelevant, or simply not true. Indeed, the unrebutted testimony of the expert and educator witnesses of District 227 support this notion, and even hold up the dual district system as a boon to a student's maturation and development. The Petitioners therefore have failed to establish a substantial, legitimate justification for approving the proposed detachment, or, in the alternative, District 227 has proven that the Petitioners' proffered justification is pretextual.

Therefore, for the very same reasons we believed resulted in a violation of the Equal Protection Clause, we believe that District 227 has shown a violation of Title VI.

CONCLUSION

For all the aforementioned reasons, we believe that District 227 has met its burdens of proof and presented evidence to show the Trustees that both § 7-2b and the current Petition violate the constitutional principles embodied in the Equal Protection Clause and Title VI. However, as we have emphasized throughout this opinion, we still believe that the Trustees lack the authority to make express constitutional determinations. But we also must honor our sworn oath to uphold the Constitution; we are also bound to obey the mandates of Title VI. As such (and ONLY for these reasons), we are obligated to deny the Petition, and it is so denied.

We also recognize that the Circuit Court has retained jurisdiction over this matter. We believe the evidence

Clearly supports our conclusions. But because we lack authority to rule on the constitutionality of a statute, we have couched our findings and conclusions in terms of "we believe," for this is all the relevant guidance we can give to the Circuit Court regarding the specific issues which the Court asked us to entertain. We expressly hold that the only reason we are denying the Petition today is the evidence of a Title VI violation, which mandates we do so, and our sense that the evidence indicates the Equal Protection violation. We cannot and do not make any express findings regarding the constitutionality of the Petition or § 7-2b.

Yet, because of our constitutional oath, we ask, in *obiter dicta,* that the Circuit Court examine the record, the evidence, and our conclusions. We request that the Circuit issue an order and express finding that § 7-2b is unconstitutional as applied in this case as violative of the Fourteenth Amendment of the United States Constitution and Title VI. We would further request that the Court issue an order and express finding that § 7-2b is unconstitutional in that its sole purpose and impact is to facilitate and allow White enclaves in the southern suburbs of Chicago to deannex from primarily Black school districts and annex to primarily White school districts. As such, we would ask the Court to rule that § 7-2b is void *ab initio.*

Dated: August 26, 1997

By: _____
President,
Thornton Township
Trustees of Schools

By: _____
Clerk,
Thornton Township
Trustees of Schools